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Nos. 39 and 44

In the Supreme Court of the United States

OCTOBER TERM, 1944

WILBUR V. KEEGAN, PETITIONER

v.

UNITED STATES OF AMERICA

GERHARD WILHELM KUNZE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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No. 39

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v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1070–1085) is reported at 141 F. (2d) 248.

[1] Unless otherwise expressly indicated, all "Br." citations herein to petitioners' brief refer to the brief in No. 44.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 17, 1944 (R. 1085). The petition for a writ of certiorari in No. 39 was filed on March 22, 1944, and the petition in No. 44 was filed on March 29, 1944, and the petitions were granted May 15, 1944 (R. 1089). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether an indictment charging a conspiracy to counsel persons to "evade, resist and refuse" military service, states an offense under Section 11 of the Selective Training and Service Act of 1940, in light of the facts that (a) it does not charge that the conspiracy contemplates force or violence and (b) the statute does not specifically make it an offense to resist or refuse service.

2. Whether the admission in evidence of statements given by certain petitioners under circumstances claimed to render applicable the rule of *McNabb* v. *United States* constituted reversible error with respect to any of the petitioners.

3. Whether the district court committed reversible error:

(a) In instructing the jury that a bona fide purpose on the part of the defendants to secure a judicial test of the validity of the Selective Service Act would not constitute a valid defense.

(b) In refusing to declare a mistrial because newspaper articles were published during the trial, based upon a press release of the Department of Justice which condemned the German-American Bund and certain of the defendants.

(c) In admitting in evidence various Nazi symbols, insignia, song books, party programs, and other materials procured from Bund offices and the defendants, for their bearing upon petitioners' intent and actions.

4. Whether the evidence is sufficient to support the convictions.

STATUTES INVOLVED

The applicable statutory provisions are set forth in Appendix A, *infra*, pp. 114–116.

STATEMENT

On July 7, 1942, all of the petitioners except Streuer and Agne were indicted, together with four others,[2] in the District Court of the United

[2] The four other persons indicted were William Luedtke, Karl A. Bachmann, John Grill, and Ferdinand Callsen. George Froboese and Paul Anding, while named in the indictments as co-conspirators, were not made defendants because they were deceased. (R. 1). Luedtke, Bachmann, and Grill entered pleas of guilty, while Callsen was acquitted by the jury (R. 1027–1028). Luedtke testified as a Government witness.

States for the Southern District of New York for conspiring among themselves and with others from January 1, 1940, to the date of the indictment to counsel divers persons to evade, resist, and refuse service in the land and naval forces of the United States, in violation of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App., Sec. 311; *infra*, pp. 114–116). On August 26, 1942, a second indictment was filed in the same court charging petitioners Streuer and Agne with participating in the same conspiracy from January 1, 1940, to the date of that indictment.[3] It was alleged that it was a part of the conspiracy that each of the defendants was and would remain a member or associate of the German-American Bund; that each of them was a responsible leader of the Bund; that petitioners Kunze, Klapprott, and Elmer, and co-conspirator Luedtke, the national officers of the Bund, together with petitioner Keegan and others, conferred together and prepared written "Bund Commands," customarily in the German language, and that the national officers, together with petitioners Fentzke and Schwinn and co-conspirator Froboese and others, distributed and caused to be distributed these Bund Commands to various

[3] The two indictments were consolidated for the purpose of trial by consent of counsel (R. 6) and, since they are identical except as to the defendants named in them, were treated as one in the proceedings below and are so treated here.

units of the Bund; that the Bund Commands, pursuant to the direction of the national officers and Schwinn, Fentzke, and Froboese, were read or otherwise made known to persons attending meetings of units of the Bund; that on about October 1, 1940, there was prepared at the Bund's national headquarters and thereafter distributed Bund Command No. 37, which counselled, directed, and urged those to whom its contents were made known to evade, resist, and refuse service in the land and naval forces of the United States; that Bund Command No. 37 was thereafter read and its contents were otherwise made known by various petitioners to persons attending meetings of units of the Bund; that the national officers and petitioners Keegan, Rapp, and Fentzke cause to be inserted in "The Free American and Deutscher Weckruf und Beobachter" and to be published and distributed, certain items urging German-American citizens and others to resist, refuse, and evade service in the land and naval forces of the United States; and that the petitioners otherwise urged German-American citizens and others to resist the provisions of the Selective Training and Service Act of 1940, and to evade service in the land and naval forces of the United States (R. 1–4).

Of the 28 defendants indicted, 25 stood trial but offered no evidence in defense of the charges against them. All except Callsen were found

guilty by a jury (R. 1027–1028) and each was sentenced to imprisonment for five years (R. 1060–1061). Upon appeal to the Circuit Court of Appeals for the Second Circuit the convictions were affirmed (R. 1070–1085).

The evidence introduced by the Government in support of the indictments falls into two main categories: (a) evidence dealing with the German-American Bund and its purposes, which would indicate the defendants' motives and the purpose of their acts, and (b) evidence of the defendants' specific actions, conduct and statements, showing the existence of the conspiracy and the steps taken pursuant to it. The evidence most favorable to the Government, summarized according to these categories, may be stated as follows.

A. PETITIONERS AND THE BUND

All of the petitioners except Keegan were for greater or less periods responsible officials of the German-American Bund, closely allied in the United States to the National Socialist Party in Germany (See Gov. Ex. 4A, R. 30; Gov. Ex. 7A, pp. 28–30, 80, 81, R. 38[illegible]. Petitioner Kunze was the supreme national leader of the Bund, its "Bundesfuehrer,"[1] from December, 1939, to No-

[1] The Bund operated and was governed on the basis of the "Leadership [Fuehrership] Principle" (Gov. Ex. 18, R. 57; Gov. Ex. 4A, pp. 9–11, R. 30; Gov. Ex. 6A, p. 5, R. 35; Gov. Exs. 24A, 25, 28, 183, R. 60, 61, 381). At least after September 1, 1940, all power in the Bund was vested in the National

vember 1941 (R. 201, 202, 209, 212; Gov. Ex. 87, Commands 24, 36, R. 73; Def. Ex. B, pp. 2, 38); petitioners Klapprott and Elmer and co-conspirator Luedtke were, respectively, Gauleiter of the Eastern "Gau" or department (R. 28–29, 45, 201, 212),[5] the Bund's national treasurer and organizational manager (R. 45–46, 191, 201, 212; Gov. Ex. 142A, R. 141), and its national secretary (R. 26, 201, 212); petitioner Schwinn was the Gauleiter of the West Gau (See e. g., R. 29; Gov. Ex. 87, Command 33A, R. 73; Gov. Ex. 197, p. 11, R. 442); petitioners Agne, Bachmaier, Belohlavek, Berg, Borchers, Bregler, Christoph, Fentzke, Fitting, Knupfer, Kunz (to be distinguished from petitioner Kunze), Ottersbach, Rapp, Schatz, Schneller, Jr., Schwinn, Streuer, Weiss, Wendlandt, and Willumeit were "Unit Leaders," the responsible, governing officials in direct control of

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Leader whose "will * * * is the supreme law of the movement * * *" (Gov. Ex. 4A, pp. 9–11, R. 30; including the ownership of all Bund property, the control of all Bund policies, the admission and expulsion of members, and the appointment and removal of all officials, including the national officers (see, e. g., Gov. Ex. 4A, pp. 10–11, R. 30; Gov. Ex. 6A, p. 5, R. 35; Gov. Ex. 87, Command 48, R. 73; Gov. Exs. 151, 187A, 330, 354, R. 353, 428; see also R. 61–62, 69–70; Gov. Exs. 33C, 34A, 34B, 35, R. 66, —, —, —).

[5] For purposes of organization the Bund divided the United States into three main divisions called Gaus, or departments, which were called the Eastern, Midwest, and West Gaus (R. 28), each of which was headed by a Gauleiter (*ibid.*). The Gaus were further subdivided on a geographical basis, the subdivisions including units, as well as smaller groups (R. 28; Gov. Ex. 4A, Sec. 2, R. 30; Gov. Ex. 6A, R. 35).

"units" which usually embraced the entire Bund membership in a single city (See, e. g., Gov. Ex. 4A, R. 30; Gov. Ex. 87, Commands 16, 27A, 30, R. 73).[6] Petitioner Keegan became the general counsel to the Bund in November, 1939, and was a Bund member (R. 47, 48, 55, 104, 163, 165–166, 183; Def. Ex. B, p. 3).[7]

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[6] The locales at which these petitioners were the unit leaders during the conspiracy were as follows: Agne—Philadelphia, Pa. (R. 614, 618); Bachmaier—Erie, Pa. (R. 141, 251–252; Gov. Ex. 299, R. 631); Belohlavek—Cleveland, Ohio (R. 93, 141, 555, 563; Gov. Ex. 265, R. 568); Berg—Minneapolis, Minn. (R. 92, 392, 417; Gov. Ex. 187A, R. 428); Borchers—Jamaica, N. Y. (R. 131, 367, 373; Gov. Ex. 183, R. 381); Bregler—Lindenhurst, N. Y. (R. 92, 581–582); Christoph—Newark, N. J. (R. 605; Gov. Ex. 99, 298, R. 92, 611); Fentzke—New York City (R. 90, 748); Fitting—Hudson County, N. J. (R. 165, 435; Gov. Ex. 202, R. 448); Knupfer—Brooklyn, N. Y. (R. 322, 331; Gov. Ex. 151, R. 353); Kunz—Bronx, N. Y. (R. 731; Gov. Ex. 354, R. 735); Ottersbach—Seattle, Wash. (R. 141, 768; Gov. Ex. 356, R. 762); Rapp—New York City (R. 46, 87, 743); Schatz—Troy, N. Y. (R. 490, 501; Gov. Ex. 242, R. 500); Schneller, Jr.—Erie, Pa. (R. 141); Schwinn—Los Angeles, Cal. (R. 141, 247, 286, 294, 300, 304); Streuer—Detroit, Mich. (R. 141); Weiss—Astoria, N. Y. (R. 91; Gov. Ex. 95, 204, R. 91, 469); Wendlandt—Buffalo, N. Y. (R. 141, 640, 658, 716; Gov. Exs. 309, 330, R. 659, 667, 676); and Willumeit—Chicago, Ill. (R. 93, 141, 518, 528; Def. Ex. B, p. 17). Willumeit was also the District Leader for the States of Illinois and Indiana (Def. Ex. B, p. 87).

[7] Membership in the Bund was secret and limited to "Aryans" free from Negro or Jewish blood; applicants for membership were required to subscribe to the "Leadership Principle," to obey all rules and orders, to submit a reference from Germany, and to undergo a six-months probation" (See, e. g., R. 60, 62–63, 262–263; Gov. Exs. 4A, 24A, 25, 28A, 29, R. 30, 60, 61; Gov. Ex. 87, Commands 31, 40, R. 73).

The Bund was organized in 1933 under the name of "Freunde Des Neuen Deutschland," the "Friends of New Germany" (R. 22–23; Gov. Exs. 197, 198, 246, R. 442); in 1935 it changed its name to "Amerikadeutscher Volksbund," the "German-American Bund," when, as the then Bundesfuehrer, Fritz Kuhn, said, "a change of name seemed dictated by good judgment if we are to accomplish our ends" (Gov. Ex. 197, R. 442; Gov. Ex. 198, p. 2, R. 442. See also Gov. Ex. 87, Command 38, R. 27). The Bund's purpose was to advance and protect the interests of Germany both in this country and abroad, to serve as the militant proponent of the German-American element within the United States, and to combat the "bolshevization of the United States" (Gov. Ex. 198, p. 6. See also Gov. Exs. 1, 197, R. 26, 442. See also Gov. Ex. 87, Commands 22, 23, R. 73; Def. Ex. B, pp. 52–86). In 1936 Bundesfuehrer Kuhn publicly proclaimed: "We [the Bund] will educate the American people to become Friends of the New Germany * * * the Germany of today—the National Socialist Germany—the Third Reich * * * as American citizens [we shall] advance our political interests, defend our native land against lies and slander and to a great extent do justice to our exalted task of making known the aims and objects of the Third Reich. * * * The German-American Volksbund is inspired

with the National Socialist world concept * * * Let us take the leader of all Germans, Adolf Hitler, as our illustrious example * * *. In the spirit of the German nation we will form a solid phalanx to fight the common enemy * * * to defend our fatherland from being defiled by the foul aspersions of its enemies * * *" (Gov. Ex. 198, pp. 2, 4, 6). During 1936 Kuhn made a trip to Germany, where he conferred with Hitler and others. (Gov. Ex. 87, Command 1, R. 73). In a report to the Bund on this trip, Kuhn said in part: "I know today better than ever before the direction in which our Bund must go. I know that it is not only important to continue our work, but I know that the American German Bund is called to assume the political leadership of the German element in the United States" (*ibid.*).

Subsequently Kuhn revealed that the Bund's "considerations of the political situation are based on two viewpoints. The purely American standpoint, as American citizens, and the standpoint as an organization bound to the [German] folk, which is to engage in political activity favorable to the German fatherland" (Gov. Ex. 87, Command 2, R. 73). In its 1936 Constitution, which continued in effect until February 1940 (R. 56), the Bund held out that it was its purpose, among others, "to unite * * * men and women of the Germanic Race * * * for the mutual benefit

of the United States and Germany * * * defend with all lawful means at our disposal the good name and honor of our mother-country (Germany) against base defamation, wilful and poisonous lies, and purposeful malice, emanating from any ill-wishing * * * source whatsoever, be it race, people * * * nation * * * be and remain worthy of our Germanic blood, our German motherland * * * work incessantly and courageously for the fundamental right of every civilized nation to tend to its own business of self-government without interference from outsiders" (Gov. Ex. 1, pp. 1–3, R. 26). In a document issued in 1940 entitled "German-American Bund-Organizational Structure and Rules and Regulations for Officers and Members" (Gov. Ex. 4A), the leaders' task is stated to be "to maintain and to extend the German-American Bund as an offensive and defensive movement of a nationally conscious German-American people who are National Socialistically and Constitutionally dedicated to the service of an actually independent Aryan-governed United States of America" (Gov. Ex. 4A, pp. 9–10, R. 30).[8] In August 1940, the Bund announced in a "Statement of Facts" published in its official newspaper (see *infra*, p. 17) that "The

[8] Petitioner Kunze said that this document was "the result of serious studies not only of the experience of the Bund and its predecessors, but also of the experience of the old country under the leadership of the greatest German of all times" (Gov. Ex. 4A, p. 77, R. 30).

Bund is what it has been since 1936 * * *" (Gov. Ex. 135, pp. 1–2, R. 141).

At the Bund's 1940 convention (see *infra*, p. 20), Gauleiter Froboese, discussing the Bund's "important work of the future" (Gov. Ex. 7A, p. 77, R. 38) "in accordance with the principals [sic] of this movement," in part stated that the Bund's new constitution, prepared in 1940 by Keegan and Kunze after Kunze had abrogated the 1936 constitution (Def. Ex. B, pp. 22, 37), "takes the standpoint that the National-Socialist Movement is not tied down by geographical conditions but rather is an everlasting struggle for our existence as a people in the entire world" (Gov. Ex. 7A, p. 78, R. 38).[9] Asked by petitioner Fitting why the Bund retained its name, Froboese replied, "Because we want to indicate expressly who we are. * * * Why should we beat a retreat in this respect? It is as if we would no longer be Nazis if we changed our name. * * *" (Gov. Ex. 7A, p. 79, R. 38).[10] Petitioner Weiss

[9] At one point in the convention Kunze stated: "You have seen how the Friends of New Germany changed their whole method of attack. This, of course, did not mean that the principles of the movement were to be changed. This movement is the only salvation of our Germans." (Gov. Ex. 7A, pp. 30–31, R. 38.)

[10] ~~At one point in the convention Kunze stated: "You have seen how the Friends of New Germany changed their whole method of attack. This, of course, did not mean that the principles of the movement were to be changed. This movement is the only salvation of our Germans." (Gov. Ex. 7A, pp. 30–31, R. 38).~~

then stated: "They caused us enough trouble in New York and now you want us to change our name? The important thing is not the name one goes under but the principle that one represents. As long as we represent the National-Socialist principle, we are the enemies. * * * (Gov. Ex. 7A, p. 79, R. 38)."[11]

Further attesting to the Bund's character were its various organizational and operational aspects. Thus, for example, Nazi party structure, terminology, symbols, insignia, ceremonials and salutes were utilized (R. 367; Gov. Exs. 4A, 5A, 6A, 7A, R. 30, 35, 38; Gov. Ex. 87, Commands 37, 38, R. 73; Gov. Exs. 256A, 256B; R. 544); its officers and members engaged in periodic military drills under German military procedure (R. 60, 323–324, 330; Gov. Ex. 4A, Sec. 3; Gov. Ex. 5A, p. 22); uniforms modeled to a great extent after those of the Storm Troopers and the Elite Guard of the Nazi Party in Germany were worn until their use became illegal in certain states in 1939 (R. 227–230, 289; Gov. Ex. 4A, Sec. 3, Gov. Ex. 5A, p. 22, Gov. Ex. 6A; Gov. Ex. 30; Gov. Ex. 87, Commands 6, 15, Gov. Exs. 124, 125, 126, 147, 177, 296, R. 30, 35, 61, 73, 103, 259, 372, 594); at meetings and gatherings the swastika, characterized

[11] A delegate asked, "Is it correct when somebody explains to a fellow who does not know anything that we are carrying out a policy such as Henlein introduced [in Czechoslovakia]?" Froboese replied, "Let us not go too far. We mustn't do that" (Gov. Ex. 7A, p. 80, R. 38).

as the symbol of "the will of the Aryan world to live," was displayed (Gov. Ex. 6A, pp. 12, 22, R. 35), as were pictures of Hitler, to whom the Bund leaders referred as "our philosophical prototype" (Gov. Ex. 4A, p. 29, R. 30), and Bund members sang the Nazi national anthem, the Horst Wessel song (See, e. g., R. 367, 371; Gov. Ex. 4A, Sec. 3, R. 30; Gov. Ex. 6A, pp. 12, 14, 19, 20, R. 30, 35; Gov. Ex. 17; Gov. Ex. 87, Commands 4, 17, R. 73; Gov. Exs. 152, 164A, 165A, 267, R. 353, 372, 568); and the Bund celebrated the holidays of the Third Reich, at times "according to the instructions of the Reich representative" (Gov. Ex. 87, Command 4; Gov. Exs. 4A, Sec. 3; 6A, pp. 12, 18, 22; 198; R. 30, 35, 73, 442).

Procedure and conduct of all Bund activities were rigidly prescribed and controlled, and uniformity of ideology, thought, and action was obtained by means of secret regulations and secret Bund Commands, "Bundesbefehle." These Bund Commands were issued at about monthly intervals by the National Headquarters of the Bund (See, e. g., R. 70–71, 449; Gov. Ex. 87, R. 73) and were in the name of the Bundesfuehrer. During the period of the conspiracy they were issued after consultation between the Bundesfuehrer, the Bund's national executive committee, and petitioner Keegan (R. 70–71, 740).[12] Unit

[12] The national executive committee included the national officers and Gauleiters of the Bund (R. 71, 191, 202, 209;

leaders and other officials of the Bund were required to read all or certain parts of these Commands to the Bund members under their jurisdiction shortly following receipt of each Command (See, e. g., R. 291, 294, 300, 410, 740; Gov. Ex. 6A, p. 14, R. 35; Gov. Ex. 7A, p. 30, R. 38; Gov. Ex. 87, Commands 1, 2, 9, 17, 19, 24, 25, 26, 28, 29, 31, 32, 33A, 35, 36, 42, R. 73; Gov. Exs. 183, 202, 298, 354, 356, R. 381, 448, 611, 735, 762).[13] Obedience to the Bund's regulations and Commands was mandatory upon all Bund members (See, e. g., Gov. Exs. 4A, 5A, R. 30); Gov. Ex. 6A, p. 16, R. 35; Gov. Ex. 7A, p. 28–30, R. 38; Gov. Exs. 24, 24A, 33, R. 60, 66; Gov. Ex. 87, Commands 2, 8, 12, 26, 27, 32, 35, 36, 41, 42, R. 73; Gov. Exs. 183, 204, 242, 298, 299, 356, R. 381, 448, 500, 611, 631, 762).[14]

Gov. Ex. 4, pp. 10–13, R. 30; Def. 3d B. pp. 1, 12, 29, 134–135). This committee and Keegan generally aided Bundesfuehrer Kunze in reaching decisions on matters of Bund organization, policy, and action (R. 70–71, 191, 193).

[13] Certain of the exhibits referred to are statements given by individual petitioners prior to the trial. They were admitted in evidence only against those making them.

[14] Thus, for example, petitioner Fitting had stated to an agent of the Federal Bureau of Investigation prior to his arrest that, "Bund Commands or orders * * * were obligatory, and * * * when a man signed up for membership in the Bund, he agreed to the Fuehrership Principle, and inherent in that principle was obedience to any Command or Order given by the Leader or the Fuehrer, and the very fact he joined the organization made it incumbent upon him to obey those Commands" (R. 449). Petitioner Bachmaier, in a written statement made prior to his arrest, states that, "Wilhelm Kunze said that if we were interested in the German-

Failure to obey Commands was to be reported specifically to the national headquarters of the Bund (Gov. Ex. 5A, R. 30; Gov. Ex. 87, Commands 5, 26, 48, R. 73; Gov. Exs. 183, 204, 242, 298, 299, R. 381, 448, 500, 611, 631) and subjected the recalcitrant member to possible expulsion from the Bund (Gov. Ex. 1, pp. 18–19, R. 30; Gov. Ex. 4A, pp. 10, 11, 20, R. 30; Gov. Exs. 183, 298, 330, R. 381, 611, 676)[15] and possible reprisals (Gov. Ex. 7A, p. 53, R. 38; Gov. Ex. 18, R. 57; Gov. Ex. 87, Command 5, 45, R. 73).[16]

American Bund we should obey all commands" (Gov. Ex. 299, R. 631). Petitioner Weiss, in a similar statement, said that, "The members [of the Bund] were obliged to follow the instructions of the Bund Commands, as well as any other instructions issued by the national leader * * *" (Gov. Ex. 204, R. 469). In Bund Command 26 Kunze reiterated this requirement with the "demand" that there be compliance with Commands, and further directed that every office holder in the Bund see that these orders are obeyed (Gov. Ex. 87, Command 26, R. 73. See also Command 35).

[15] For example, petitioner Christoph in a written statement made prior to his arrest, stated: "If there were an infraction of any of the rules or instructions set out in the letters [commands] or by-laws, the Unit-Leader had the power to dismiss the individual" (Gov. Ex. 298, R. 611). Petitioner Wendlandt stated, under similar circumstances: "In the event any of the individual members did not approve of the activities of the organization, I was at liberty to ask for their resignations" (Gov. Ex. 330, R. 676).

[16] Thus Kuhn advised the Bund members that "we want to identify those Germans who are acting against Germany" (Gov. Ex. 87, Command 5, R. 73), and Bund members returning to Germany were given credentials and insignia certifying to their activity and service in the Bund, which were recognized in the Third Reich (Gov. Ex. 7A, p. 53, R. 38;

Another instrumentality of the Bund, for the propagation of its views and principles for consumption both by its members and by the general public, was its official newspaper, the "Free American and Deutscher Weckruf und Beobachter," which Kunze had characterized as the Bund's "most important weapon" (Gov. Ex. 87, Command 24, R. 73) and as "our fighting newspaper" (Gov. Ex. 87, Commands 33, 35, R. 73).[17] Kunze was the editor and manager of this newspaper, Klapprott acting in his absence (R. 45; Gov. Ex. 139, p. 4, R. 141); Keegan, as did Klapprott and others, contributed various articles and editorials (See, e. g., R. 48–49; Gov. Exs. 135, 137, 143, R. 141), and Keegan discussed various other articles and editorials with Klapprott and mem-

Gov. Ex. 18, R. 57; Gov. Ex. 87, Commands 5, 11, R. 73). At the Bund's 1940 convention, Bundesfuehrer Kunze, speaking concerning one of the insignia (Gov. Ex. 18), to be given to Bund members and supporters, stated that it "* * * testifies to the fact that the owner dared to accept his share in the consequences of the activities of the Bund during bitter days. We will have to work fast though so that when people return to Germany and do not have this honor pin we shall know that this was a deserter of our cause, a person who did not do his duty" (Gov. Ex. 7A, pp. 53–54, R. 38).

[17] The newspaper was published by the "A. V. Publishing Company," which was controlled by the Bund, had its offices at the national headquarters of the Bund, and had as its officers Kunze as president, Klapprott as vice-president, Elmer as treasurer, and Luedtke as secretary (R. 48; Gov. Exs. 135–143, R. 141).

The Bund also utilized other organizations in effectuating its purposes (See, e. g., Gov. Ex. 7A, pp. 10–11, R. 38).

bers of the paper's staff prior to their publication (R. 48–49). The newspaper was sent to all Bund members, to outside subscribers, and to the official German "Auslands Institut" in Germany, "to Adolph Hitler" (R. 54; Def. Ex. B, p. 54; Gov. Ex. 87, Commands 7, 24, 28, 33, 35, 42, 45, R. 73; Gov. Exs. 195, 310, R. 442, 663); it was at times also distributed to the general public free of charge (See, e. g., Gov. Ex. 144B, R. 258).[18]

B. PETITIONERS' ACTIONS WITH REFERENCE TO CONSCRIPTION

On June 20 and 21, 1940, bills were introduced in Congress providing for compulsory military training (86 Cong. Rec. 8680, 8908). Co-conspirator Luedtke, national secretary of the Bund and a member of its national executive committee (*supra*, p. 7), testified that it was the position of the Bund and of its national and other officers that while they were in favor of military service as such, they were opposed to the selective service legislation of 1940 because they did not wish an American army to be raised for war against Germany (R. 87–88, 266–267, 268, 275, 276–277, 280–281; Gov. Exs. 144A, 144B, R. 258). On the day the first of the bills was introduced in Congress, petitioner Kunze issued a secret Command to the entire Bund membership, in effect assailing

[18] The distribution of this newspaper was handled by petitioner Fentzke (R. 44, 739, 741).

"hatred of Germany and war agitation"; and stating that "all Germandom is persecuted" and that means must be created to defend it, and calling for support by means of "money and with propaganda" (Gov. Ex. 87, Command 33, R. 73).[19] Thereafter, Kunze and other Bund officials discussed the proposed legislation "at all times" at the Bund's offices (R. 266). During such discussions Kunze and petitioner Klapprott both stated that they "would not fight against Germany," and expressed the conviction that the pending legislation would raise an army to "be used against Germany" (R. 266–267).

In the August 8, 1940, issue of its newspaper, the Bund carried a front page editorial, with the banner headline "Democratic Reign of Terror. Senate Legislation which Revives the Dark Days of the Knownothing Party." The editorial attacked legislation requiring the registration of aliens, referred to the "New Deal's version of a draft," which would not exempt German-Americans, announced that "The zero hour has struck!", and urged German-Americans to unite in "opposition to the dangerous legislation referred to." (Gov. Ex. 135, R. 141.)[20] The August 15 issue con-

[19] Kunze also urged the distribution of "the Weckruf and pamphlets of enlightenment to all corners of the land" (Gov. Ex. 87, Command 33, R. 73).

[20] This issue also carried a signed article entitled, "German American Estate in American Life, an Appeal for Unified Thought and Action" (Gov. Ex. 135, p. 8, R. 141), by peti-

tained an editorial in German by petitioner Klapprott (R. 264–265), entitled, "Oh, What a Joy to be a Soldier," attacking the conscription gram. (Gov. Ex. 144B, R. 258).[21]

The Bund's 1940 convention was held in Chicago on August 31 and September 1, 1940 (Gov. Ex. 7A, p. 1, R. 38), and was attended by petitioners Kunze, Knupfer, Wendlandt, Christoph, Fitting, Willumeit, Fentzke, Elmer, Klapprott, Belohlavek, Streuer, Borchers, Weiss, and Keegan (R. 89, 105, 253; Gov. Ex. 7A, pp. 1, 10, 12, 16, R. 38; Def. Ex. B, pp. 86–90, 110–112), co-conspirators Luedtke, Grill, Froboese, and others (*ibid.*). All delegates were directed to "appear in the service uniform" (Gov. Ex. 87, Command 34, R. 73). Luedtke presided; the national officers, Gauleiters, and Keegan made formal reports (R. 40, 225; Gov. Ex. 7A, pp. 2–36, R. 38), and they

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tioner Keegan, which urged German-Americans to join and support the Bund and Kunze in the work of the Bund, by subscribing to "our newspaper, joining our business league, making donations to our fighting fund * * *."

In February 1940, Kunze had ordered that no officer or member of the Bund appear before any committee or other official body to testify concerning the Bund unless he was accompanied and represented by the Bund's general counsel and "unless and until that committee or official body agrees to guarantee accused persons full right to appear in self-defense and to cross-examination of the accusers" (Def. Ex. B, p. 24).

[21] This, as well as other issues of the newspaper, carried the appeal "The Fighting Fund Needs Your Help—Address contributions to the German American Bund" (See, e. g., Gov. Exs. 135, p. 2, R. 141; Gov. Ex. 144B, R. 258).

and other petitioners also spoke (Gov. Ex. 7A, *passim*). A stenographic transcript was made of the convention proceedings (R. 107, 225; Gov. Ex. 7A, R. 38); but at Kunze's express direction his references to compulsory military service and other pending legislation were omitted from that transcript (R. 107, 108, 196, 197, 225, 226). Luedtke testified, however, that Kunze spoke about military service and repeated the views which had been urged previously (see *supra*, pp. 19–20); that Kunze also said that while the pending draft legislation was "a good thing for the nation, under the leadership of the President [it] would be eventually used against Germany," and that he opposed its passage (R. 267–268, 275).

At the convention Kunze urged all to exert every effort to continue the Bund's work, stating at one point that "* * * our movement is more important than any one individual * * * if we have people who are willing to bear up under any punishment that may be dealt out to us * * * we cannot fail (Gov. Ex. 7A, p. 32, R. 38) * * * anyone working for our cause knows that our members have joined a movement which is to fight a certain battle and which will have to accept the dangers which such a battle might bring with it (Gov. Ex. 7A, p. 33, R. 38) * * *. If our Bund is really worth something, it has the right to demand that its leaders * * * be willing to risk the danger of

going to prison, if necessary" (Gov. Ex. 7A, p. 36, R. 38).[2] Kunze was "reelected national leader of the Bund by acclamation (Gov. Ex. 7A, p. 75, R. 38), after Keegan had addressed the convention and spoken on his behalf (Gov. Ex. 137; p. 7, R. 141).

On September 7, 1940, an amendment was offered in the House to the Selective Service bill (86 Cong. Rec. 17748; R. 210), which was subsequently adopted as Sec. 8 (i) of the Act, stating that it was the policy of the Congress that members of the Bund and of the Communist party be not employed to fill vacancies in business or industry caused by the drafting of employees into the armed forces. The proposal of this amendment, according to the witness Luedtke, "gave the Bund the opportunity to go out and fight this Act in the open" (R. 268). Accordingly Kunze, as National Leader of the Bund, sent telegrams of protest to the Vice President and the Speaker of the House, demanding "to be heard in opposition to the enactment of this bill" (R. 197–198; Gov. Ex. 137, p. 1, R. 141) and followed these with a telegram to the President demanding a veto, after the bill had passed both houses of Congress (Gov. Ex. 137, p. 2, R. 141). The Act was signed on September 16, 1940.

[2] Previously Kunze had informed the Bund's officials that "• • • every faithful leader [of the Bund] can expect to be locked up" (Gov. Ex. 87, Command 26, R. 73).

Three days later the Bund advised its members, by means of banner headlines in its newspaper: "No Civil Rights—No Military Duty! Draft Exempts Bund Members!" The accompanying article accused Congress of "declaring civil war" upon all but Anglo-Saxons. It reproduced the telegrams sent by Kunze and, like the telegrams to the Vice President and Speaker, represented the amendment as applicable to all German-Americans. It concluded by stating that German-American citizens "cannot legally be drafted under this Conscription act." (Gov. Ex. 137, pp. 1–2, R. 141). The newspaper simultaneously carried articles and material commendatory of Germany and Hitler (*ibid.*).

On an unidentified date between about August 24 and October 1, 1940, Kunze held a meeting of the Bund's national officers in his office, at which the substance of Bund Command No. 37, issued on October 1, 1940 and dealing with the Selective Service situation (see *infra*, p. 25), was discussed (R. 83, 87, 219–224).[23] This meeting was attended by petitioners Kunze, Keegan, Elmer, and Klapprott, and co-conspirator Luedtke (R. 83,

[23] Although Kunze's secretary at his direction kept a transcript of this meeting and Luedtke thereafter placed it in the Bund's minute book (R. 84, 87), at the time of the trial the minutes were missing (R. 84, 85–86, 192, 219). Luedtke, as national secretary, usually kept the minute book in a locked file cabinet to which he and Kunze's secretary had duplicate keys (R. 84, 85, 153).

87, 194). Kunze stated that the Bund must take it upon itself to fight "the Voorhis Act, the Alien Registration Act, and the Selective Service Act" (R. 87; see also R. 84, 268), which he said affected every German-American (R. 87) and described as "links in a chain of discriminating action against German-Americans, designed to eliminate German-American life from the United States * * *." With particular reference to the Selective Service Act, Kunze "felt that * * * [it] discriminated against Bund members * * * and that the Bund as the fighting organization of the German element must take it upon itself to fight this legislation" (R. 87–88), and that "the Bund would have to fight particularly this Selective Service law which * * * degraded German-Americans" (R. 88; see also R. 221–223). At the request of Kunze, at this meeting Keegan intervened occasionally with "legal phraseology in the given matter" (R. 84; see also R. 88). All persons present "agreed with Mr. Kunze, with what Mr. Kunze had said" (R. 88).

In accordance with its usual procedure in issuing Commands (R. 82–84, 87, 88), the Bund, on October 1, 1940, issued Command No. 37, signed by Kunze (Gov. Ex. 73, R. 68). This Command, which was distributed to all officials of the Bund, including all of its "Unit Leaders," is translated

in pertinent part in Government Exhibit No. 87 as follows:

> 4. *Military Service:* On October 16, of this year, all citizens and non-citizens (male) who are of age, but who have not passed their 36th year, must register with the military authorities. This order must be complied with unhesitatingly.
>
> We represent the standpoint, however, that AN INDUCTION into the MILITARY SERVICE is NOT justified, in as far as it concerns Bund members and American Germans, *for in the Selective Service Law the citizenship rights of Bund members and the defenders of Germandom are unconstitutionally severed!*
>
> EVERY MAN, if he can, will REFUSE *to do military duty until this law and all other laws of the country or the states which confine the citizenship rights of Bund members* ARE REVOKED!
>
> *We will fight to establish a precedent in this servile matter!* [Emphasis as in original.] [24]

[24] Although petitioner's counsel at the trial vigorously cross-examined the Government's translator of the German original of this Command (see, e. g., R. 75–82) and elicited from him various concessions as to possible additional variations in English of certain of the German words and phrases (*ibid.*), petitioners offered no direct evidence in contradiction of the Government's translation. The German text of Bund Command No. 37 is printed in Appendix B, infra, pp. 117–119.

The indictment translates the concluding paragraph as follows:

> We shall fight this issue of oppression out as a test case. (R. 3.)

Shortly after the issuance of this Command, a meeting of unit leaders of the Bund was held, presided over by petitioner Klapprott, leader of the Eastern Gau, and attended by about 50 of the Bund's members, national officers and unit leaders, including petitioners Keegan, Elmer, Borchers, Knupfer, Kunze, Kunz, Fentzke, Christoph, and Fitting (R. 109–110, 230–231, 391, 451, 461; Gov. Exs. 184, 354, R. 762). The "main theme" of the discussion was the Selective Training and Service Act. (R. 109–110, 231–235, 391.) Kunze, Keegan and Klapprott participated in the discussion (R. 109–110, 232). Keegan stated that "there was a constitutional question involved that the German-Americans were discriminated against and that it was our right to establish our rights, and that the Bund, as the fighting organization, must take it upon itself to correct this" (R. 110). Kunze related his actions to prevent passage of the Selective Service Act and stated that the next issue of the Bund's newspaper would contain the headline, "No rights, no duties" and that "the Bund will take it upon itself to fight this law * * *" (R. 110, 234–235). Amplifying his statement concerning the article, Kunze said in substance

that members of the Bund had been discriminated against "and consequently if they were deprived of their right to work they should not be saddled with the burden of performing military service" (R. 235). Borchers asked whether paragraph 4 of Command No. 37 was legal (R. 391). Everyone present agreed with the Bund's position as enunciated at this meeting (R. 110, 234).

As predicted by Kunze, the October 3, 1940, issue of the Bund's newspaper carried a front page article captioned, "No Rights, No Duties." The article consisted in the main of a reprint of a letter from a subscriber to Secretary of State Hull, in which it was stated in part that "where there are No Rights, there are No Duties! The government cannot expect cooperation from the people deprived of the 'equal protection of the law'" (Gov. Ex. 139, R. 141). Following in the same column on the front page was a proclamation by Kunze calling upon all German-Americans to set aside the following Sunday partly as a day of prayer "for the success of the German people" in their war with England and France, and an editorial attributed to Keegan exhorting German-Americans to "resist and die * * * to again restore the liberty lost, and the self-respect scoffed at, in preference to being easy-going, soft victims of such brute force of fire and violence * * *

that now calls upon us to sacrifice another God-given right—life—to forge the chains that will bind us forever into serfdom" (R. 150–151, 169–178; Gov. Ex. 139, R. 141).

In accordance with Bund requirements (*supra*, pp. 14–15) Command No. 37, shortly after its issuance was read or otherwise made known to members of local units by petitioners Bachmaier (R. 632; Gov. Ex. 299, R. 631), Belohlavek (R. 556, 563–564; Gov. Ex. 265, R. 568); Berg (R. 396, 406, 409, 410, 416, 418, 419; Gov. Exs. 187A, R. 428), Borchers (R. 366–367), Bregler (R. 582, 583), Christoph (Gov. Ex. 298, R. 611), Fentzke (R. 740–741), Fitting (R. 436, 456–457; Gov. Ex. 202, R. 448), Knupfer (R. 324–326; Gov. Ex. 151, R. 363), Kunze (Gov. Ex. 354, R. 735), Ottersbach (R. 768–769; Gov. Ex. 356, R. 762), Rapp (R. 743, 744–745), Schatz (R. 490, 492; Gov. Ex. 242, R. 500), Schwinn (R. 288, 294, 300, 304, 346), Streuer (R. 753, 756–757, 758), Weiss (R. 333; Gov. Ex. 204, R. 469), Wendlandt (R. 641, 693, 717, 722), Willumeit (R. 508, 514, 528–529, 532–533, 536), and probably Agne (R. 614–615, 622–623). In most instances the reading of Command No. 37 by these petitioners was followed by discussion then or later of its subject matter, with particular emphasis upon what was required of the Bund members in the premises (e. g., R. 367–368, 395–398, 404, 410, 411, 413, 415, 436, 439–440, 510, 511, 512, 515, 520, 521, 523, 530, 534, 622, 722–723, 731–

734, 743; Gov. Exs. 183, 204).[25] Thus, after petitioner Knupfer had read this Command at a meeting of his unit he explained to those present "that there was a lot of German people losing jobs, and in a case like that we should refuse to fight," that "* * * losing jobs, * * * no German should fight for this country" (R. 324, see also R. 327, 328). When a Bund member persistently questioned Knupfer as to what would happen to him if he refused to go into the Army, Knupfer assured him that "nothing will happen to you * * *" and that there was an attorney in the organization who would take care of things like that (R. 325). See also R. 327. Petitioner Rapp informed his unit that although the members had to register, they should not be required "to fight against German people" (R. 743). At Los Angeles "the former O. D. leader" stated during the ensuing discussion that "it would be unfair while a member of the Bund had been taken out of the rights of taking a job or filling a job from a draftee—it would be unfair * * * at the same time to any person to take the duty of registry for military service" (R. 297). At Buffalo during the ensuing discussion, petitioner Wendlandt stated

[25] The value of such discussions was attested to by a member of the Bund, who testified: "If a command like that be read off, or any kind of a command, we listen to it, but the main thing and the best explanation we get out of it is afterwards when it be told in, what will I say, in an open way, that everybody can understand it" (R. 328).

to the Bund members present that "it was a damned shame German blood has to be spilled against our German brothers over in the old country * * * until the United States is ready with the armed forces the war will be over with Germany winning" (R. 716–717. See also *infra*, pp. 104, 109).

Following the issuance of Command No. 37, Kunze, accompanied at various times by Luedtke, Klapprott, Froboese, Elmer, or Keegan, attended meetings of various units of the Bund throughout the United States, at which they discussed the Bund's official policy with respect to compliance with the Selective Training and Service Act (R. 136–138; Gov. Ex. 127, 128 R. 94; Gov. Ex. 87, Commands 38, 39, 41, 42, 44, 48, R. 73). For example, Kunze addressed a meeting of 20 or 25 members of the Philadelphia unit, stating in part "that it would be unfair to deny German-Americans the right to work on one hand and on the other hand expect them to serve in the armed forces," and promising that "the Bund would take steps to correct this unfairness" through its lawyer. Petitioner Agne, the unit leader, stated that he had "hoped Mr. Kunze had made an impression on us" (R. 619, 620). At a meeting of the Chicago unit, petitioner Willumeit read Command No. 37 to a group of 60–100 persons (R. 526, 531). Kunze at this or another meeting discussed and explained the Command in detail (R. 529–530, 532–

533), stating in part that if "* * * we are not good enough to work as American citizens then we are not good enough for military service either" (R. 530, 520; see also R. 526). Keegan, at this or a subsequent meeting, said that "as long as Bund members were not permitted to work in defense plants it * * * would not be justified for them to serve in the armed forces" (R. 521, 526). At a meeting of the New York City unit, during a discussion among petitioners Klapprott, Rapp, and others, it was stated that "* * * they had to register for military service but they did not think it was right to ask them * * * to fight against Germany" (R. 749). On Kunze's visit to the Seattle unit he addressed a group of about 30 or 40 persons, stating, in part, that the German-Americans were discriminated against and that as German-Americans they should not fight for this country (R. 769) or against Germany (R. 779). He reported that a test case would be brought in the East (R. 777).

Addressing a special meeting of the Los Angeles unit, Kunze is stated to have spoken "elaborately" about Command No. 37 (R. 305), advising the membership that "the only way to stop this Jewish manipulation of the Government by compelling us to enlist would be to refuse service" (R. 305), and that "one can always be a conscientious objector" (R. 305, 316, 341). In October or November 1940, Kunze, speaking at a joint meet-

ing of the St. Paul and Minneapolis units, advised the members present that "those that could afford it should refuse military service * * *" (R. 410, 411, 397). At that or another such meeting, Kunze stated in substance that "German-Americans were discriminated against and the Bund would fight for the rights, refuse Selective Service and make a test case" (R. 413). Kunze either sought or advised the membership to "discourage the Germans * * * from joining the armed forces of the United States" (R. 415). At a meeting of the Newark unit in October or November 1940, attended by petitioners Christoph and Klapprott, Klapprott stated that "if the German-American citizen is not treated as such he would not have to bear arms for this country" (R. 606, 609).

In October or November 1940 Kunze and Keegan both addressed the Brooklyn unit with reference to Command No. 37, Kunze speaking in German and Keegan in English. Both in effect stated that if someone "has got the nerve" to disobey the draft act, he would "make a test out of this case". (R. 334, 335, 336, 337.) [26]

[26] There is other testimony that references were made at various times to a "test case" (see e. g. R. 296, 304, 309, 318, 334, 397, 411, 625, 713, 770). One Bund member construed the "test case" statement as meaning "* * * that when there is a case coming up where a member loses his job on account that he is a Bund member, that the Bund as an organization will bring it forward to a court to see whether it

After Pearl Harbor and the outbreak of war with Germany (R. 153) the Bund, consistently with its earlier planned policy (R. 305, 319, 506, 719; Gov. Ex. 87, Command 40), encouraged the maintenance of German singing, hiking and other societies (R. 322, 365–366, 506, 647, 719) "to keep the movement going so that they would not be hounded by the authorities" (R. 719).[27] Following

will be refused or adopted; that means, in words, whether it can work or it cannot work" (R. 534).

[27] Thus, in a statement to the Bund's 1941 convention, held in August 1941, Kunze said in part:

"Some of our branches have all different names, which does not hurt the movement in the least, as long as the belief and the aims remain the same. Though they may appear as a singing society and what not, the inner kernal of the group remains. We have thus built up with great success the 'Volkschor' it being the only means left to us to appear in public which is necessary periodically to bring in the necessary funds towards our upkeep. Its main purpose will always exist, namely, to influence German-Americans standing outside of our ranks. We have not forgotten this in our choice of songs, they are worthy of our movement, and as a result certain people are joining the Volkschor, that never knew of our existence. Where a singing groups (sic) was not possible we have organized a sports group, others have had to limit themselves to the O. D. as a working group in camps * * * We have published a song book, the 'Singkamerad' which is of such a nature as never has been published, namely in that it contains songs, which are not sung generally by other singing societies, but are songs that represent and dignify our work, our ideals * * *. Its 150 Songs certainly do their part in boosting our movement, and therefore should be used more often and with greater appreciation. Furthermore, it is a book that can be used outside of the movement for the name Amerika

a concert of the Volkschor (People's Choir) in New York City on December 13, 1941, petitioner Klapprott summoned aside petitioners Elmer, Keegan, Rapp, Wendlandt, Weiss, Fentzke, Christoph, Borchers, Fitting, Kunze, and Knupfer, and possibly Bregler, and directed them to continue their work, stating that "all should continue on, work together, hold on together, and keep on going" (R. 155, 244–245).[28] Keegan also spoke to the group, reiterating

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Deutscher Bund Volksbund is not on it. Instead only the A. V. Publishing Corporation's name is printed on the inside cover. Yet, it carries in its covers the ideas of the movement in every phase of life" (Def. Ex. B, pp. 173–175).

At this convention Kunze had also stated that although the "political situation will become more and more difficult, therefore, there ought to be no fundamental changes in our principle * * *" and that "We say to ourselves that our idea and work does not only serve the German-American here, but that they represent a philosophy which will serve the whole world" (Def. Ex. B, pp. 165, 173). Kunze further indicated that the Bund made use of pamphlets, circulars, and other means to disseminate ideas which "could not be printed in the English part of the Newspaper" (Def. Ex. B). During the winter of 1940, Kunze prepared a pamphlet entitled "'Das Blut ist Heilig' (Blood is Sacred)" (Gov. Ex. 304, (R. 659), which was published and distributed by the Bund (Gov. Ex. 87, Commands 31, 40, 42, 43, 50, R. 73); Gov. Ex. 196, R. 442), which reaffirmed the principle of universality of German blood under the leadership of "the greatest German of all time, Adolf Hitler" (Gov. Ex. 87, Command 39, R. 73).

[28] Kunze had referred to singing societies and other adjuncts of the Bund as groups "* * * created for service in the movement * * *" (Gov. Ex. 87, Command 27, par. 5, R. 73).

Klapprott's instructions (R. 155, 245–246). In January or February 1942, Keegan, Klapprott, and Wendlandt appeared at a meeting of the East Buffalo Hiking Club (R. 646, 780, 781), which apparently succeeded the Buffalo unit of the Bund (R. 780–782). The meeting was attended also by 14 or 15 youths between the ages of 17 and 22 and several adults (R. 646, 781). Klapprott and Keegan addressed the meeting. Keegan referred to his sons in the army and stated to those present that "you boys are lucky in a way, you might evade military service because you are foreign born" (R. 781, 783). When asked by one of the young men how they could evade military service, Keegan replied, "By claiming being a conscientious objector" (*Ibid.*). Another of those present asked what would happen if he, a naturalized citizen, "tried to evade military service by claiming being a conscientious objector," to which Keegan replied that the questioner "would lose his citizenship." (R. 781–782). The questioner replied, "* * * to hell with that. It took me five years to take the citizenship papers, and I am not going to lose them

[29] At a meeting of the Buffalo unit in the spring of 1941, a member asked whether the Bund would dissolve, "and show the Government of the United States that it is a patriotic organization and want to fight for the country * * *." Kunze, Wendlandt, and others of the Bund laughed at him. (R. 644.)

apparently succeeded the Buffalo unit of the not reply. (R. 782.)*

Petitioners rested at the conclusion of the Government's case without offering any testimony in their defense (R. 845).

SUMMARY OF ARGUMENT

I

The indictment is sufficient.

Petitioners' contention that the conspiracy clause of Section 11 interdicts only conspiracies to hinder or interfere with the administration of the Act by force or violence is the same as that advanced in *Singer* v. *United States*, No. 30, this Term, which will be argued immediately following this case. For the argument in support of the Government's view that the conspiracy clause applies to conspiracies to commit any of the substantive offenses set out in Section 11, the Court is respectfully referred to the Brief for the United States in the *Singer* case.

The court below properly held that in the context of the statute the term "evade", which it contains, includes "not only furtive acts of evasion but also * * * any form of refusal or resistance," and that the forbidden counselling of evasion, which petitioners were charged with conspiring to accomplish, includes counselling to resist and refuse, which the indictment also charges. This conclusion is borne out by the purpose and

legislative history of Section 11 and accords with the view expressed in *Bullen* v. *Wisconsin*, 240 U. S. 625, 630–631, that "When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

II

No error was committed by the trial court in admitting, as against only the individuals who made them, statements which were given by fourteen of the petitioners to special agents of the Federal Bureau of Investigation. The contention of petitioners that the doctrine of *McNabb* v. *United States*, 318 U. S. 332, rehearing denied, 319 U. S. 784, forbade admission of the statements is invalid. Only the statements of petitioners Kunze and Wendlandt were made while they were under arrest. The others clearly were admissible. The Kunze and Wendlandt statements were also admissible, first because the circumstances under which they were obtained do not fall within the doctrine of the *McNabb* case; second, because, as respects even Kunze and Wendlandt themselves, the statements were relatively unimportant as evidence of the offense with which they were charged; and third, because as respects other defendants than Kunze and Wendlandt, the statements were in no wise prejudicial.

In respect to Wendlandt, it appears that his statements were given on the day following his

arrest in Buffalo on July 7, 1942 and that he was arraigned the next day. He was advised of his constitutional rights and was not subjected to coercion. The statements which petitioners complain were improperly admitted, were cumulative of two others which had been given several weeks prior to Wendlandt's arrest.

Petitioner Kunze gave his statement after having been questioned intermittently between 11 A. M. on Sunday, July 5, 1942, when he was brought to New York City by F. B. I. agents, and 5 A. M. on Monday, July 6. He was arraigned upon another charge on the latter date and pleaded not guilty to the indictment in the present case on Tuesday, July 7. The statement which petitioner contends was invalidly admitted was one of three that were given at substantially the same time. All of them were obtained without coercion, after Kunze had been advised that he need not make any statement and that any statement which he made might be used against him. The defendants themselves offered in evidence one of Kunze's statements, after the Government had offered the statement of which complaint is made. Both of these statements were general in nature and bore only indirectly upon the offense charged in the indictment, except that the one offered by the defendants contained an account of the issuance of Bund Command No. 37. The statement offered by the Government showed that

Kunze was an ardent German sympathizer and outlined his views in regard to the policy of this country. The statement which the defendants offered contained a rather full review of Kunze's personal history and beliefs.

In the present case, which differs in this respect from *McNabb* v. *United States* and *Anderson* v. *United States*, 318 U. S. 350, there was an abundance of evidence to warrant the jury in convicting, apart from the statements in question. The fact that defendants offered a statement of petioner Kunze, obtained at the same time as the one introduced by the Government, is a further indication that the contents of the statements were at most cumulative of other evidence. The rule of the *McNabb* case does not apply for the additional reason that there was no prolonged detention for the purpose of extracting the statements, and no coercive methods were used. Both Kunze and Wendlandt were arraigned with reasonable promptness.

The Kunze and Wendlandt statements did not incriminate the other defendants. Apart from the fact that the court repeatedly instructed the jury that each statement was to be considered as evidence only against the defendant who made it, the contents of the statements did not involve the other defendants in any way. The statements were but an insignificant part of the evidence adduced by the Government.

III

The other contentions with respect to alleged errors at the trial are likewise without merit.

A. Petitioners contend that the jury were not properly instructed with reference to the effect upon their guilt of a possible bona fide intent to precipitate one or more test cases to determine the validity of Section 8 (i) of the Selective Service Act. Even if the offense of conspiracy requires a "corrupt intent" and this intent involves consciousness of wrong-doing, the petitioners clearly had the requisite intent. They knew that evasion of military service and the counselling of such evasion violated the Selective Service Act. Guilt would not be negatived by the purpose of making a test case, since persons who challenge the constitutionality of statutes must stand the consequences of being found to be wrong. There is no reason for a different rule in conspiracy cases.

B. Petitioners assert that the trial judge erred in failing to declare a mistrial because of publication during the trial of newspaper articles based upon a press release of the Department of Justice, which condemned the Bund and certain of the defendants. We are of the opinion, however, that petitioners suffered no prejudice from this cause. The record shows that the jury was warned at the beginning of the trial by the judge not to be influenced by newspaper publicity. When the articles and the Department of Justice press release

were called to the judge's attention, he again instructed the jury upon this point. At the close of the trial he interrogated the jury *in camera* and satisfied himself that "they have read nothing or heard nothing which has in any way influenced them or prejudiced them in the trial of this case." It seems clear in the light of this record that the trial was safeguarded in every practicable way and that no harm to the petitioners resulted from the issuance of the press release.

C. There is no warrant for petitioners' assertion that the trial of the case "was characterized by the admission of numerous prejudicial and inflammatory exhibits having no tendency to prove the crime charged." It is true that among the Government's exhibits there were pictures of Hitler and other Nazi leaders, and party programs, pamphlets, uniforms and flags; but these were only a part of the Government's exhibits and they were properly received as evidence showing the connection of the various petitioners with the Bund and the nature and purpose of the organization. The trial was not conducted in a manner designed to incite prejudice, and the jury's deliberations and verdict show that they gave careful consideration to the case.

IV.

We respectfully submit that, contrary to the petitioners' contention, the evidence of guilt is substantial and clearly sufficient to support the

verdict of the jury. The verdict has the explicit approval of both the trial judge and the court below. The conspiracy centered at the Bund's national headquarters and the evidence demonstrates that those petitioners who were members of the National Executive Committee attempted to prevent the enactment of the Selective Service Act and, after its adoption, to impede its operation by stimulating refusal of military service on the part of persons of German extraction. The other petitioners participated in this purpose in varying degree. Each of them knew the nature and purpose of the organization and played a responsible part in it. The role of each in carrying out the conspiracy is established by definite evidence. It was not necessary to establish participation by each defendant in all aspects of the conspiracy. A summary of the evidence with regard to each petitioner shows the role which he played.

ARGUMENT

I

THE INDICTMENT IS NOT DEFECTIVE

Petitioners attack the indictment in two respects. Their contention that the conspiracy clause of Section 11 interdicts only conspiracies to hinder or interfere with the administration of the Act or Selective Service Regulations by force or violence is the same as that advanced in *Singer* v. *United States*, No. 30, which will be argued

immediately following this case. In the Brief for the United States in the *Singer* case we set forth the considerations which in our view impel the conclusion that the conspiracy clause of Section 11 proscribes conspiracies to commit any of the substantive offenses set out in that section. For the argument in support of our position the Court is respectfully referred to that brief.

Petitioners also contend that while Section 11 makes it a crime to counsel others to "evade" service, it does not make it a crime to counsel others to "resist and refuse" service as was also charged in the indictment and that no facts were alleged which showed the counselling of "evasion" in the sense of avoidance by subterfuge, as distinguished from the counselling of resistance or refusal.

Section 11 makes it a crime, *inter alia*, for any person knowingly to counsel, aid or abet "another to evade registration or service in the land or naval forces or any of the requirements of this Act, * * * or rules or regulations made pursuant to this Act." The court below held (R. 1077)—correctly, as we think—that in the context of the statute "evade" includes "not only furtive acts of evasion but also * * * any form of refusal or resistance." As is shown in the Government's brief in the *Singer* case, Section 11 is based upon the several statutes which denounced offenses connected with the administration of the

Selective Draft Act of 1917, and the section embodies a Congressional purpose to define all of the offenses relating to the Selective Service program.

The clause which makes it an offense to counsel evasion is an addition to the previous legislation. The legislative history does not reflect any particular reason for the use of the term "evade," which probably derived from Section 6 of the 1917 Act. That Section made punishable "any person who * * * evades or aids another to evade the requirements of this Act * * *."[30] The legislative history of the 1940 Act shows clearly, however, that the sponsors of the bill intended to, and believed that they had, proscribed conduct such as petitioners'. In the course of the hearings before the Military Affairs Committee of the Senate on the Burke-Wadsworth bill, which ultimately became the Selective Training and Service Act, Senator Burke, one of the authors of the bill, stated in response to the contention that the portion of Section 11 relating to counselling evasion was too broad:

> There is nothing in [Section 11] which would prevent or interfere at all with any citizen * * * objecting to it, seeking its repeal in all legitimate ways, expressing opposition to it publicly and in every other way, but at the same time, as long as it

[30] Act of May 18, 1917, c. 15, Sec. 6, 40 Stat. 80, 50 U. S. C. App., Sec. 206.

> remains the law, complying with its provisions. And that is the only case where these penalties would be imposed, *where one urged another not to seek repeal of the law but to refuse to obey it while it remained the law.* (Emphasis added.) (Hearings, Senate Committee on Military Affairs, 76th Cong., 3d sess., p. 156. See also pp. 154–155.)

Literally, to "evade" is to escape or avoid; and evasion is often accomplished by the use of skill, dexterity or contrivance. Webster's New International Dictionary, 2nd Ed., p. 883; 3 Murray, New English Dictionary, p. 327 (to "get out of" performing a duty or making a payment). While evasion often connotes subterfuge or contrivance, these are, as the court below noted (R. 1077), only some of the more common means of escaping a duty. There is, we submit, no basis for concluding that Congress desired to limit the offense of counselling evasion to the promotion of surreptitious avoidance of duty. No reason appears why Congress should have forbidden the counselling of subterfuge, leaving untouched the promotion of open defiance of the Act. Frontal assaults constituted a major problem in the administration of the Draft Act during the First World War. Congress, in the light of this experience, scarcely intended to leave the present Act open to similar attacks, and it is much more rea-

sonable to conclude that in proscribing in Section 11 all conduct which would interfere with the operations of the Selective Service system, Congress added the evasion clause and the counselling clause in order to forbid the employment and the stimulation of all means of escaping military service. There is nothing in the legislative proceedings to support a more limited construction.

The Congressional use of the term "evasion" in Section 11 is the same, we think, as that of this Court, speaking through Mr. Justice Holmes, in *Bullen* v. *Wisconsin*, 240 U. S. 625, 630–631: "When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law." Petitioners' conduct plainly was "on the wrong side of the line indicated by the policy" of the Selective Training and Service Act. At times they suggested to prospective selectees that they should resort to the subterfuge of claiming conscientious objection (*supra*, pp. 32, 35); at other times they exhorted persons of German ancestry to refuse and resist service under the Act. Both types of conduct fall within the class of activity which, as Senator Burke made clear, Section 11 was intended to forbid.

The fundamental purpose of the statute must, of course, be the guide in its interpretation. The rule of strict construction of penal statutes does not require that such a statute "be strained and

distorted in order to exclude conduct clearly intended to be within its scope * * *;" nor does it preclude employment of the usual means of ascertaining legislative intent, other than the reading of words in their narrowest sense. *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Gaskin*, 320 U. S. 527, 529; *United States* v. *Giles*, 300 U. S. 41, 48; *Gooch* v. *United States*, 297 U. S. 124, 128; *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 170; *United States* v. *Corbett*, 215 U. S. 233, 242–243. See generally the Government's brief in *Singer* v. *United States*, *supra*. Accordingly we submit that the construction of the relevant statutory provision for which the Government contends is correct because it gives effect to the Congressional purpose to provide adequate protection for the Selective Service system. Such a construction was reached in the only reported decision which we have found relating to the problem at hand; *United States* v. *Offutt*, 127 F. (2d) 336 (App. D. C.). In that case the court held (p. 339) that an allegation of conspiracy to induce a failure to report for induction was a valid particularization of the allegation of conspiracy to "evade"—a conclusion which accords fully with our contention here.

Petitioners also assert (Br. 78) that the indictment is defective in that it charges the petitioners' offense "merely in the generic language of the statute". Actually the indictment (R. 1–

4), states in its first paragraph not merely that the defendants counselled diverse persons to evade, resist, and refuse service in the land and naval forces of the United States but that they did so "in the manner and by the means hereinafter more particularly set forth." The means set forth are not, as petitioners allege, merely the issuance of Bund Command No. 37, but all of the steps which they took in carrying out their purpose. These include the following acts: Continuance of membership in the Bund; distribution of authority among them according to the offices held by the several petitioners; distribution of the Bund Commands by certain of the petitioners and imparting of their contents to local members by other petitioners; and publication of pertinent articles in "the free American and Deutscher Weckruf and Beobachter".

It is difficult to suppose an indictment, covering the conspiracy which was alleged and proven upon the trial, which would extend further into matters of detail, except one which recited the evidence at length. We submit that the indictment in this case fully meets the test stated in *Hagner* v. *United States*, 285 U. S. 427, at p. 431, in the following words: "The true test of the sufficiency of an indictment is * * * whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet' * * *.

Cochran and Sayre v. *United States*, 157 U. S. 286, 290; *Rosen* v. *United States*, 161 U. S. 29, 34."[31]

II

THE ADMISSION OF THE WENDLANDT AND KUNZE STATEMENTS DID NOT VIOLATE THE RULE OF THE MCNABB CASE

Petitioners take the view that reversible error as to all of them resulted from the admission in evidence, only as against the persons who made them (R. 391), of statements given by fourteen of them, and by the defendant Callsen, to special agents of the Federal Bureau of Investigation under circumstances which petitioners claim render the rule of *McNabb* v. *United States*, 318 U. S. 332, applicable. Except for one statement by petitioner Kunze and an oral and a written statement by petitioner Wendlandt, there can, we submit, be no possible question of the admissibility of the statements. For with these exceptions, the statements were given by the several defendants at times prior to their arrest when none of them was detained and under circumstances which

[31] It is doubtful whether any more specific allegation than counselling of evasion would have been necessary. See *United States* v. *Lepowitch*, 318 U. S. 702, in which this Court held that it was sufficient for an indictment to contain "the most general allegation of impersonation of a government official", in charging that the defendant falsely assumed or pretended to be an officer or employee acting under the authority of the United States.

do not bring the doctrine of the *McNabb* case into play.[32]

The court below was of the view (R. 1080–1084) that the statements of Kunze and Wendlandt had not been obtained during a period of unlawful detention and that, in any event, if the *McNabb* rule was technically violated, the admission of the statements did not prejudice any of the petitioners substantially and provided no basis for reversal. We submit that the court's conclusions are correct in both respects.

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[32] The statements were voluntarily given to FBI agents in May 1942, at least five weeks before the various defendants were arrested or charged with any crime; the agents called on the defendants and told them that they would like to talk to them concerning the activities of the Bund and their relationship to it. Each defendant was advised of his legal rights and of the fact that the statement might be used against him. The statements were taken either in an FBI office or in the defendant's home or place of business. The statements were generally to the effect that the defendant had been a unit leader of the Bund and that he conveyed Bund Command 37 to his membership, and in some cases that he related the operations of the Bund in greater detail. Bachmaier, Gov. Ex. 299, R. 630–632; Belohlavek, Gov. Ex. 265, R. 567–568; Berg, Gov. Ex. 187A, R. 426–428; Borchers, Gov. Exs. 183 and 184, R. 380–384, 390–391; Callsen, Gov. Ex. 203, R. 467–468; Christoph, Gov. Ex. 298, R. 610–612; Fentzke, R. 737–741 (only part of the contents of the statement was read to the jury); Fitting, Gov. Ex. 202, R. 447–449; Knüpfer, Gov. Ex. 151, R. 353, 362–364; Kunz, Gov. Ex. 354, R. 735–736; Ottersbach, Gov. Ex. 356, R. 762–763; Schatz, Gov. Ex. 242, R. 500–502; Weiss, Gov. Ex. 264, R. 469–470, 475; Wendlandt, Gov. Exs. 309 and 330, R. 659, 667–668, 676–680.

A. *Wendlandt*.[33] According to the testimony of a Federal Bureau of Investigation agent, Wendlandt was arrested on the afternoon of July 7, 1942 (R. 682) after having gone voluntarily with the Agent to F. B. I. headquarters that morning (R. 682–683). The indictment under which he was arrested was returned in New York City at or after noon on that day (R. 686). On the next day, in the Erie County jail at Buffalo, New York (R. 691), he gave the oral and written statements which were admitted in evidence at the trial "against the defendant Wendlandt only" (Gov. Ex. 331, R. 692). According to the official records of the district court, however, a bench warrant was issued for the arrest of Wendlandt on July 7, because he could not be found[34] within the Southern District of New York. The record of

[33] Since at the time of the trial in September 1942 the *McNabb* case had not yet been decided by this Court, the record does not reflect all of the facts which are essential to determine whether the rule of that case is here applicable. Under these circumstances the Government has undertaken to submit additional relevant evidence from the official records of the district court and the United States Commissioner of which it requests the Court to take cognizance. Cf. *Bowles v. United States*, 319 U. S. 33, 35. We have lodged with the Clerk of this Court photostatic copies of the relevant records, which are referred to hereafter. See Memorandum in Opposition, p. 26 *et seq.*, and Petitioner's Reply Brief, pp. 3–7.

[34] See the photostatic copy of the docket entries of the district court, p. 507.

the United States Commissioner's proceedings[35] also shows that a warrant was issued by that officer on July 7 and that it was returned on July 9 endorsed as follows: "Received this warrant on the 8 day of July 1942, at Buffalo and executed the same by arresting the within named [Karl Richard Wendlandt] at Buffalo on the 8 day of July 1942."[36] Wendlandt was arraigned the same day before a Commissioner of the District Court of the United States for the Western District of New York, his bond was fixed at $10,000, and on his inability to make bond he was committed to the Erie County jail.[37]

It does not appear whether the statements obtained from Wendlandt on July 8 were made before or after his arraignment[38] on that date.

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[35] See photostatic copy lodged with the Clerk of this Court, of the transcript of proceedings before the Commissioner for the Western District of New York.

[36] It would appear that Wendlandt's arrest on July 7, 1942 by F. B. I. representatives was made upon information received from New York City concerning the return of the indictment in this case and that Wendlandt was formally arrested on July 8, 1942 by the U. S. Marshal.

[37] See the photostatic copy, lodged with the Clerk of this Court, of the Commissioner's order, entered after hearing, committing Wendlandt to the Erie County Jail. Wendlandt was subsequently removed, with his consent, to the Southern District of New York for trial. See the photostatic copies of the notice of application for such removal, Wendlandt's consent thereto, and the order of removal.

[38] Wendlandt was also interviewed by agents of the FBI on three earlier occasions (see *supra*, p. 60; *infra*, pp. 55–57). He was first interviewed on April 9, 1944, and at that time he

Likewise it does not appear that he was interrogated after his arrest on July 7, 1942 or at any other time except during the preparation of the long hand statement, on which he collaborated with the F. B. I. agent who interviewed him. He was advised of his constitutional rights. (R. 691.) That statement recited that he never engaged in subversive activities against the United States; that he was never approached by any of the leaders of the Bund "to do any sabotage or espionage work for the Bund;" that as local unit leader he had not "followed all the rules, regulations, commands and by-laws of the bund in cases where they were not applicable to his local group;" that he assumed leadership of the Buffalo unit of the Bund in September 1940; that the first command he received was numbered 36 and dated September 2, 1940; that he wrote to national head-

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declined to make a statement because he wanted to think the matter over (R. 658). On May 5, Wendlandt called FBI agent Young and arranged a meeting for May 6, at which time he gave first statement (*infra*, p. 55) (R. 659, 666). Wendlandt was advised by FBI agent Young that "he did not have to make the statement if he did not want to and that it was possible that the statement might be sometime used against him in a court of law. I told him that he could get an attorney if he wanted to, or anything that way, and he advised me that he did not wish an attorney and he was perfectly willing to make any statement and sign any statement that was true" (R. 668). On May 26, Wendlandt again went to the FBI office and a second statement was given (*infra*, pp. 56–57), after he had again been advised as to his rights (R. 679–680).

quarters for an explanation of Bund Command 37 because he did not understand part of it; that he read Bund Command 35, relating to alien registration, to his unit and discussed it with the members; and that his unit was dissolved after the outbreak of war in December 1941.

In addition to the written statement, the Federal Bureau of Investigation agent who interviewed Wendlandt on July 8, testified that Wendlandt said "that he had either read or passed Bund Command No. 37 around at one of the meetings, but that he could not recall whether he read it out loud to them or whether he passed it around, and for that reason he did not want that included in the statement. He specifically requested that we leave that out of the statement, inasmuch as he was uncertain as to which of the two he had done. He also advised us at the time that he had discussed the command at one of the bund meetings in Buffalo" (R. 693).

To adopt the language of this Court in *United States* v. *Mitchell*, 322 U. S. 65, at p. 69, on these facts "the foundations for application of the *McNabb* doctrine are here totally lacking." For there is no showing that the statements in question were secured by interrogation during a period of illegal detention or even before arraignment, or that petitioners' convictions rest on the statements. In the *McNabb* case, by contrast, the Court pointed out that "the admissions made by

Freeman, Raymond and Benjamin constituted the *crux* of the Government's case against them, and the convictions cannot stand if such evidence be excluded" (318 U. S. at 338). And in *Anderson* v. *United States,* 318 U. S. 350, it appeared that "The prosecution *rested principally* on these confessions and the testimony of the informant * * *, whose credibility was under severe attack" (318 U. S., at 356). (Emphasis added.) See also *Cohen* v. *United States,* No. 10,508, C. C. A. 9, decided September 29, 1944.

In any event, in the present case, which is unlike the *McNabb* and *Anderson* cases in this respect, neither Wendlandt's nor his fellow defendants' convictions rest on the statements in question. As we have shown, *supra,* p. 16, Wendlandt gave two previous statements to the Federal Bureau of Investigation under circumstances which completely preclude the application of the *McNabb* doctrine, since he was not then detained or under arrest. In the first statement which Wendlandt gave on May 6, 1942, he briefly summarized his life and stated that he had visited Germany in 1936–1937 and had attended school at the Nurnberg Technical Institute; that "Upon my return from Germany, I joined the German-American Bund. I belonged to the German-American Bund from some time in the latter part of the year 1937 until December 1941"; that he was "local Leader" of the Bund during the last

year and one-half of his association with it; that he attended the 1940 and 1941 national conventions of the Bund; that at one of the conventions "I was called upon to speak on the subject of youth, and on the same platform on the same occasion Wilhelm Kunze was present and spoke"; that his local unit had a small membership and did not meet regularly, although he collected dues from the members and forwarded the money to national headquarters; that he distributed the Bund's newspaper and collected the fees due for it; that when he was appointed unit leader of the Bund he assumed the name Karl Wendel "so that my mother would not know that I was connected with the national office of the German-American Bund"; that he maintained a separate post-office box for the same reason; that early in 1942 Klapprott and Keegan visited him and that they discussed "alien problems in this territory"; and that all the printed matter that he had in his possession was sent to him by the national office. (Gov. Ex. 309.)

This statement was supplemented by a second statement which Wendlandt made on May 26, 1942, which was also several weeks prior to his arrest (see fn. 38, *supra*). In that statement Wendlandt said that as unit leader of the Buffalo unit he received the "Bund orders or bulletins" which were sent out by national headquarters;

that "During the time that I was unit leader, it was my custom to furnished [sic] to the membership information contained in the bulletins, which I felt was information they should know. I did not read the complete bulletins to them. It was my understanding * * * that the various bulletins issued were for my information and that I was to pass on only such information contained therein which concerned the individual members"; and that Bund Command 37 was among the commands which he received from national headquarters. (Gov. Ex. 330.)

Thus, prior to the reception in evidence of the statements of which petitioners now complain, the Government had shown by Wendlandt's prior statements that he was closely aligned with the Bund and that as unit leader of the Buffalo unit he received the various Bund commands for discussion with the members of his unit. While Wendlandt did not state that he read Bund Command 37 to his membership or discussed it with them, he did state that it was his practice to bring to the attention of the membership those commands which concerned them. In addition, three members of the Bund from Buffalo testified that Wendlandt had read Command No. 37 to the unit members (R. 641, 717, 722). In these circumstances the oral and written statements of July 8, of which petitioners complain, were merely cumu-

lative and added nothing of substance to the Government's case.

B. *Kunze.* This petitioner was received from the custody of the Mexican government on Saturday, July 4, 1942 (R. 795).[39] Two Federal Bureau of Investigation agents immediately took him by plane to New York City, arriving there at 8:15 a. m. on Sunday, July 5 (R. 794). He slept occasionally during the plane trip (R. 796). At New York he was fingerprinted, booked, photographed and placed in a cell (R. 794). He was questioned intermittently between 11:00 a. m. on Sunday and 5:00 a. m. on Monday, July 6. In the course of his interrogation he signed three statements (R. 795, 790). One of these statements, given on July 6, was admitted in evidence as Government Exhibit 358 (R. 788–789). Another of the statements was marked as Government Exhibit for Identification 359 (R. 796) and was later withdrawn (R. 789), because the Government did not deem it pertinent to the case (R. 798); this statement was thereupon offered in evidence by the defense and received as Defendant's Exhibit "G" (R. 796–798). The third statement, which was made available to defense counsel (R. 790), was not offered by either side.

Prior to making the statement which is objected to here Kunze was advised that he was not re-

[39] The reason for his detention by the Mexican authorities is not shown by the record.

quired to make a statement and that, if he did, it might be used against him (R. 788).

Kunze, at his own insistence, dictated part of Government Exhibit 358 and he was afforded an opportunity to make corrections as to the remainder before he signed it (R. 787–788). The statement, as admitted in evidence, recited that he had registered for the draft; that he left the United States on November 8, 1941, for Mexico for the purpose of returning to Germany and renouncing his American citizenship; that the closing of the German consulate in Mexico prevented him from accomplishing his objective; that his sympathies in the war were with Germany and Japan; and that the President provoked war with Japan.

On Monday, July 6, the same day that this statement was made, Kunze was arraigned upon a complaint filed in the District Court of the United States for the Southern District of New York, charging him with the offense of wilful failure to keep his draft board advised of the address at which mail could reach him, in violation of Section 11 of the Selective Training and Service Act.[40] On the following day (July 7) the indictment in

[40] See the photostatic copy lodged with the Clerk of the Court, of the minutes of the Clerk of the Southern District of New York for July 6, 1942, showing that Gerhardt Wilhelm Kunze was on that day arraigned on a complaint, that bail was fixed at $50,000, and that Kunze was remanded to custody pending a hearing on July 13, 1942.

this case was returned and he pleaded not guilty to it."[41]

At the trial, when Government Exhibit 358 was received in evidence, the judge instructed the jury that the statement "should be considered by you only in your consideration of the charge against the defendant Kunze, who made the statement". (R. 789). Before the statement was submitted to the jury, the court ordered Kunze's admission that he was a wilful draft evader to be deleted from the statement (R. 788). The statement, as submitted to the jury, not only does not refer in any way to any of the other petitioners, but does not connect Kunze with the issuance of Bund Command 37 or in any other way with the conspiracy charged. It was relevant solely as background evidence bearing upon the intent

[41] See the photostatic copies, lodged with the clerk of this Court, of the Criminal Docket pages showing the entry, on July 7, 1942, of Kunze's pleas of not guilty to both charges. On page 23 of petitioners' brief it is stated that Kunze was arraigned upon the indictment in this case on July 9, 1942. This statement is apparently based upon the "Form of Clerk's statement of docket entries to be forwarded under Rule IV. (To accompany duplicate notice of appeal to the United States Circuit Court of Appeals.)" This "Form" appears at R. 1062 and is entitled in the case of petitioner Keegan. The statement is made that arraignment occurred July 9, 1942. There is no evidence in the record that petitioner Kunze was arraigned on the same day; indeed, the "Form" is followed by an "N. B." note to the effect that "This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal * * *."

of Kunze in issuing Bund Command 37 and in doing other acts amply shown by other evidence to have been done in furtherance of the conspiracy. According to the court below (R. 1081), "It is evident that Kunze's statement contained no direct proof of his connection with the conspiracy and did not mention the Bund, or any of the appellants, or their activities, but only showed that he was an ardent German sympathizer, was dissatisfied with his United States citizenship, proposed to leave the country and become a German citizen, and would be against most things which are now part of our national policy. It furnished no direct proof against him on the primary issue of counselling resistance to the draft. The showing of sympathy with Germany and Japan and of opposition to our national policies was substantiated by all the proof in the case and particularly by Order 37 and by the Bund newspaper for which Kunze as Bundesfuehrer was clearly responsible."

Even more important, however, in showing that petitioners were not prejudiced by the admission of Government Exhibit 358, is the fact that on the same day that that statement was received, Kunze's counsel offered in evidence a second statement which Kunze gave to the Federal Bureau of Investigation during the period of his detention, which was received as Defendant's Exhibit "G" (R. 798). That exhibit, we

submit, is a far more comprehensive and incriminating statement than Government Exhibit 358. Briefly stated, it reviewed Kunze's personal history, his education and employment, his Bund activities and, most important, his part in the promulgation of Bund Command 37. Kunze's counsel read to the jury that portion of the statement beginning on page 9 which relates to Bund Command 37 (R. 798). In that part of the statement Kunze gave his translation of Bund Command 37 and stated that "under the Selective Service Act, we felt German-American Bund members were relegated to a secondary or subservient position, and if they were to accept that inferior status without complaint they would thereby be indicating that they were less reliable and loyal citizens than the others are"; and that in his view "insofar as the rights and privileges of a group of citizens are curtailed in contradistinction to the rights and privileges of other groups of citizens, so must their duties in justice also be limited in a corresponding degree. This order [Bund Command 37] means simply that we consider our duties to be limited as long as but only as long as our rights are limited" (Def. Ex. "G", pp. 9–10).[*] Concerning the promulgation

[*] In respect of Kunze's Bund activities, Defendant's Exhibit "G" recited, *inter alia*:

In September, 1933, I joined the American League of Friends of New Germany, hereafter referred to as The

of Bund Commands generally, the statement recites that Kunze issued the commands, after discussing them with the National Bund Officers; that they were binding upon "the Unit leaders, officers and members and were invariably read to the members at a meeting which followed the receipt of the particular Bund Command; and that in his capacity as Deputy Leader, acting National Leader, and National Leader of the Bund he issued Bund Commands 24 through 48" (Def. Ex. "G", pp. 7-8).

Friends of New Germany, and served as a member until September 1935, when I assumed the position as Unit Leader for that group. Prior to my assumption of the Post as Unit Leader, I also acted as Public Relations Director of the Philadelphia Unit. From August, 1937 until November, 1941, I also functioned as National Public Relations Officer of the German-American Bund. It might be noted at this point that the latter organization absorbed the Friends of New Germany in March, 1936.

Some time in 1938, I was appointed to the position of National Press Director of the German-American Bund and continued in this capacity until November, 1941. From September, 1939, until December 1, 1939, I served as Deputy National Leader of the organization. I might also mention that the posts of National Public Relations Director and National Press Director were positions conferred upon me by the then National Bund leader, Fritz Kuhn.

From December 6, 1939 until September, 1940, I served as Acting National Leader of the Bund. The Bund at its convention held in Chicago in September, 1940, elected me to the position of National Leader, the post vacated by Mr. Fritz Kuhn. In December, 1938, Mr. Fritz Kuhn had appointed me as National Youth Commander and I continued in this office after assuming the national leadership of the or-

The other evidence implicating Kunze, which has been summarized, shows that, if both statements had been excluded, there still would have remained an abundance of proof to enable the jury to reach the conclusion it did reach. Moreover, the rule of the *McNabb* case does not contemplate the exclusion of a statement offered by the defendant himself, for in that situation every reason for the rule is absent. Thus, with Defendant's Exhibit "G" in evidence, we think it clear beyond any possibility of doubt that petitioners

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ganization. This position I continued until September, 1941, when I appointed Mr. August Klapprott to that position.

In addition to my position as National Leader of the Bund, I also functioned as President of the Deutscher Konsum Verband and the AV Publishing Corporation. The function of the DKV or Deutscher Konsum Verband was to combat the boycott against German goods and against the business enterprises of German Americans. The AV Publishing Corporation was a corporation devoted to the editing and publishing of the weekly issue of the "Free American" and "Deutscher Weckruf und Beobachter" This newspaper was the official organ of the German-American Bund. The duties of the above positions were exercised concurrently with my position as National Leader of the German-American Bund.

On or about November 8, 1941, I left the United States and proceeded to Mexico where the following day, November 9, 1941, in Chihuahua City, Mexico, I addressed a letter to National Bund Headquarters, Post Office Box 1, Station K, New York City, wherein I formally resigned from all membership in and affiliation with, the German-American Bund and its subsidiaries. The leadership of the organization, by terms of my letter, was conferred upon Mr. George Froboese, the Deputy National Leader.

were not prejudiced in any manner by Government Exhibit 358.

While in these circumstances there is, perhaps, no occasion for determining whether Kunze was in fact illegally detained for the purpose of extracting a confession from him, we believe that this ground for excluding an incriminating statement is likewise absent here. In the *McNabb* and *Anderson* cases it appeared from the facts of record before the Court that the defendants were inexcusably detained for the purpose of extracting confessions from them. In this case, however, the only delay in arraignment is attributable to the intervention of a holiday; Kunze was arraigned on the first business day after his arrest. Petitioners' view that arraignment must immediately follow arrest, regardless of the time or circumstances, has no support in the decisions of this Court. In the *Mitchell* case the Court noted that the arraignment statutes require that "arresting officers shall with reasonable promptness bring arrested persons before a committing authority" (322 U. S. at 66). The "all convenient speed" test applied by the court below accords with this construction of the statutes. Applying this standard, we submit that Kunze's arraignment was reasonably prompt. In the words of the court below, "To expect arraignment on the Fourth of July, or Sunday, would require a promptitude

that we do not regard as contemplated by the statutes" (R. 1084).[43]

C. *The Other Petitioners.*—Relying on the *Anderson* decision and the decision in *United States* v. *Haupt*, 136 F. (2d) 661 (C. C. A. 7), petitioners urge that if the statements of Wendlandt and Kunze were improperly admitted in evidence, there was reversible error as to all of them. This argument, we submit, is without merit.

In the *Anderson* case the statements were highly incriminating and implicated all of the defendants, including those who did not confess; and the jury was not instructed that the confessions could be used only against the persons who made them. As a consequence, the confessions came before the

[43] Cf. *Bullock* v. *United States*, 122 F. (2d) 213, 215 (App. D. C.): "Appellant's detention for more than 36 hours without hearing or commitment, which would ordinarily have been unlawful, was perhaps excused by the fact that it occurred on Saturday night and Sunday"; *United States* v. *Ebbs*, 10 Fed. 369, 375 (W. D. N. C.): "Nothing, however, but obvious necessity will authorize an officer to lodge a prisoner in jail before an examination and regular written commitment by a magistrate. This course may be adopted if the arrest is made in or near night, whereby he cannot attend the magistrate"; *Janus* v. *United States*, 38 F. (2d) 431 (C. C. A. 9), holding that detention without a warrant "until office hours" of the magistrate on the day following the arrest was proper.

It is true that none of these cases was decided under a statutory command for arraignment "immediately", such as applies here (5 U. S. C. sec. 300a, *infra*, pp. 115–116); but even such an absolute command presumably must be construed reasonably, as the court below held.

jury "as an organic tissue of proof" which, in the circumstances of the case, could not "be severed and given distributive significance." (318 U. S. at 357.) Likewise in the *Haupt* case fourteen lengthy statements which concededly were incriminating not only as to the defendants who made them but also as to the other defendants, were admitted in evidence. The jury was instructed that each statement could be considered only as against the defendant who made it, but the circuit court of appeals doubted that "it was in the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted" (136 F. (2d) at 672).

The situation here is altogether different. As the statements of Kunze and Wendlandt, as well as the statements of the other defendants, were received in evidence, the trial judge announced to the jury that each was to be considered only against the person who made it (*supra*, p. 49). While in charging the jury at the conclusion of the trial the court neglected to repeat this instruction, it should be noted that none of the petitioners either excepted to the charge in this respect or requested that the court give such an instruction (R. 1021–1025). Moreover, with the constant repetition of the instruction throughout the trial, there is little likelihood that the jury was not thoroughly familiar with the limitation upon

the statements as evidence. Even more important is the fact that none of the statements to which the present issue relates incriminated any of the other defendants. In fact, the trial judge was careful to eliminate from the jury's consideration of the statements any reference to the other defendants (R. 391). And, as we have shown, the statements were not the crux of the Government's case as they were in the *Anderson* and *Haupt* cases. Instead, there was adequate evidence outside of the statements to support the jury's verdict as to each of the petitioners. Accordingly, we submit that the remaining petitioners were not prejudiced by the admission of the Kunze and Wendlandt statements and that, even if these statements were not admissible, reversible error as to the remaining petitioners may not be predicated upon their admission.

III

PETITIONERS' OTHER ASSIGNMENTS OF ERROR IN THE CONDUCT OF THE TRIAL ARE WITHOUT MERIT

Petitioners contend that the trial judge committed reversible error (a) in instructing the jury that the fact that petitioners may have sought to test the constitutionality of the Selective Training and Service Act was no defense to the indictment; (b) in refusing to declare a mistrial because during the trial newspaper articles appeared, based upon a Department of Justice press release con-

cerning the Bund and its members, including certain of the defendants; and (c) in permitting the introduction of certain exhibits showing the nature and purpose of the Bund and its relationship to Nazi Germany.

Although petitioners now contend that they were denied a fair trial, certain of the defense counsel, in their summations to the jury, expressed satisfaction with the handling of the case by the trial judge. Mr. Banton stated that "I do not believe you will ever find a jurist * * * who has been so careful of the rights of everyone, the defendant, no matter how humble he might be, or the Government of the United States" (R. 966). Mr. Leisure referred with appreciation to the "kindness and consideration of the Court" (R. 957). The court below concluded that "the judge exercised scrupulous care and dealt with complex questions of law and fact with intelligence and fairness. In a situation where passions might run high he maintained the highest traditions of the bench" (R. 1085). With reference to the prosecution, Mr. Kiendl of defense counsel stated as follows (R. 855):

> It would be less than candid if I did not tell you frankly and openly that I do not criticize or condemn anything that has been done by the Government in this case. Quite the contrary, I have nothing but admiration and praise for what Mr. Cor-

coran and his corps of assistants have attempted to do.

The grand jury found this indictment. It was their duty to prosecute it to the best of their ability and they have done it honestly, industriously and fairly, * * *.

Petitioners' present objections should be considered in the light of these comments.

A. THE JURY WAS PROPERLY INSTRUCTED THAT AN INTENT TO MAKE A TEST CASE IS NOT A DEFENSE

Petitioners contend that the jury was not properly instructed with regard to the bearing upon criminal intent of an asserted purpose on their part to test the validity of Section 8 (i) of the Selective Service Act and of the Act as applied to Bund members. The counselling of refusal of military service, which is contained in Bund Command No. 37, is said to have been for the purpose of precipitating one or more test cases. That such was the purpose is indicated, it is stated, by testimony that neither the Bund nor any of its officers or members opposed military service as such; by statements of Keegan and others that the Act with Section 8 (i) in it was unconstitutional and would be tested; and by the wording of Bund Command No. 37 itself. If the purpose was to stimulate refusal of military service by persons of German extraction in order to precipitate test cases, the "corrupt intent" which

is an element of the crime of criminal conspiracy cannot, it is urged, have been present.

In his charge to the jury the trial judge made it clear that whether petitioners acted in reliance upon the advice of their legal counsel was a factor to be considered in determining the existence of an unlawful intent. But at a later point in the charge he stated to the jury that if it found that petitioners conspired unlawfully, wilfully, and knowingly, as charged in the indictment and required by the statute, then an intention on their part to test the constitutionality of the Act would not negative their guilt. The court's charge to the jury on this phase of the case was as follows (R. 1017–1021):

> The offense here charged is conspiracy to counsel evasion of the Selective Service Law, * * * * * * If you find beyond a reasonable doubt that the defendants did unlawfully, wilfully, or knowingly agree or conspire to counsel others to evade military service, as charged in the indictment, then they are guilty of the offense so charged, even though no member of the Bund has ever refused to do military service.
>
> In a case of this kind, it is difficult, if not impossible, to procure direct evidence of the intent of the defendants when they did certain acts alleged to constitute a crime. While it is necessary to prove the intent alleged in the indictment, direct evidence

is not necessary. The intent with which an act is done, is a state of mind which can be determined by reasonable inferences from the facts. You cannot see inside the heads of the defendants and tell what their thoughts were, but you can judge their intentions by their conduct, and for that reason, you may rely upon circumstantial evidence in determining their guilt or innocence.

It has been urged by the defendants by their counsel that whatever they may have done was done with the advice of counsel. Advice of counsel is to be considered by you on the question of unlawful intent. However, in considering that question, I charge you that before the advice of counsel can have any bearing on intent you must find all of the following things to have existed: (1) The persons seeking the advice must act in good faith; (2) they must seek advice as to what they may lawfully do under the statute; (3) they must fully and honestly lay all of the facts before the lawyer; (4) they must honestly follow the advice given; (5) they must rely upon the advice and believe it to be correct, and (6) they must not wilfully and knowingly violate the law.

* * * * *

There have been numerous references in the evidence and in the arguments of counsel to a test case said to have been proposed by the defendants or some of them to determine the validity of Section 308 (i)

of the Selective Service and Training Act which states amongst other things that it is the policy of Congress that Bund members be not employed to fill vacancies created by men in employment being drafted into the armed services. I charge you that if you should believe from the evidence that the defendants or any of them, proposed to test this law by conspiring to counsel someone to violate the law, then the fact that their purpose was to make a test case is no defense to the charge here presented against them. I repeat that the offense with which these defendants are charged is a conspiracy to counsel others to evade service in the armed forces of the United States, and such an offense would be complete, if as a fact the defendants did unlawfully and knowingly conspire, combine, or confederate together to counsel others to evade such service, and this is true even if defendants had a bona fide honest intent to make a test case. For if there was a conspiracy amongst these defendants, or any of them, having as its object the violation of the Selective Service Law, knowingly, the reason for such violation is immaterial to you in your consideration of the question of their guilt or innocence.

In regard to the matter of a test case, I call your attention to the fact that no test case was ever made, nor is there any evidence that any legal action was ever pre-

pared, and the further fact that Bund Order No. 37, by its very language, opposes military service under this and all other laws, State and national, which the Bund considered discriminatory, were repealed.

Of course, if you believe beyond a reason' doubt *doubt* that the defendants, or any of them, knowingly and unlawfully conspired to counsel evasion of the Selective Service Law, and the matter of a test case was merely a subterfuge to divert attention from their real purpose, you should find such defendants guilty as charged.

The charge of the trial judge regarding the effect of reliance upon the advice of counsel is clearly correct and was based upon the charge approved by this Court in *Williamson v. United States*, 207 U. S. 425, at page 453. Petitioners do not challenge the correctness of this portion of the charge.

The question at issue, in the light of the foregoing, is whether the succeeding portion of the charge, having to do with the effect of "a bona fide honest intent to make a test case", was improper and prejudicial to the defendants. We submit that the charge was correct and that the defendants were not prejudiced by it. Assuming it to be true, as petitioners contend, that a "corrupt intent" is an element of the crime of conspiracy and requires consciousness of wrong doing, either in the form of knowledge that the

object of the conspiracy involves a violation of law or of knowledge that the purpose of the conspiracy is morally wrong, petitioners are not aided by this rule. They clearly were conscious that refusal of military service on the part of persons called to the armed forces under the Selective Service Act, such as was urged in Bund Command No. 37, would violate the Act and, further, that the Act specifically made it an offense "knowingly [to] counsel . . , aid . . , or abet . . another to evade * * * service in the land or naval forces or any of the requirements of this Act". Even if this were not true and petitioners were ignorant of the statute, it would not follow that the acts which they contemplated would be regarded as sufficiently innocent in nature to negative the requisite corrupt intent, *Cruz* v. *United States*, 106 F. 2d 828 (C. C. A. 10).

Petitioners contend in effect, however, that despite their knowledge that violation of the statute was involved in their conduct, they would be excused if their purpose was in good faith to secure a test of constitutional issues. This contention is unsupported by authority. Ordinarily the individual who resists a criminal prosecution by relying upon the unconstitutionality of the statute under which he is prosecuted, takes the consequences of an adverse decision upon the constitutional issue. If his contention turns out to be wrong, no matter how genuinely he or his

counsel may have believed it to be right, he is rightly convicted. *Ex parte Young*, 209 U. S. 123, 147–148; *United States* v. *Anthony*, 24 Fed. Cas. No. 14, 459 (C. C. N. D. N. Y.). The question here is whether a different rule should apply to conspiracy. No reason appears why it should. On the contrary, a conspiracy to resist a statute or in order, which has specifically been made an offense, even though its purpose is to test the law, stands upon the same footing as the action of an individual in bringing a test case. If the individual who stands upon his supposed constitutional rights may suffer criminal conviction for doing so, conspirators to the same end should clearly be treated in the same manner. Nothing in the doctrine of "corrupt intent" points to a contrary conclusion.

With respect to the petitioners' conduct, which is said to have had the purpose of precipitating one or more test cases, it is fair to point out not only that no test cases were in fact brought, but, further, that petitioners' conduct was scarcely designed to procure an effective test. No one was individually approached or selected to refuse to enter upon military duty when inducted or to bring habeas corpus proceedings in order to challenge Section 8(i) of the Selective Service Act. There is no indication that persons denied employment because of Section 8(i) were sought out for the purpose of bringing suit. Instead, all and sundry, not only among members of the Bund but among

persons of German extraction generally, were urged to "Refuse to do military duty," not until the constitutionality of Section 8(i) should have been determined, but "until this law and all other laws of the country or the states which confine the citizenship rights of Bund members are revoked!" (*Supra*, p. 25.) Taking the most charitable view of Bund Command No. 37 which is possible, one must conclude that it was an attempt to force the national and state governments to abandon unspecified policies to which the Bund had objection by inducing refusal of military service on the part of persons of German extraction. Even if petitioners were right in their contention with regard to the effect upon guilt of a bona fide desire to bring a test case, clearly such a contention cannot properly extend to their actual conduct and utterances. In the light of the record, they cannot have been prejudiced by the trial court's instruction in regard to the matter of a test case, even if that instruction be regarded as erroneous instead of, as we contend, clearly correct.

B. PETITIONERS WERE NOT PREJUDICED BY NEWSPAPER ARTICLES BASED UPON A DEPARTMENT OF JUSTICE PRESS RELEASE

On October 4, 1942, about two weeks after the trial had commenced, articles appeared in the New York newspapers, based upon a Department of Justice press release which announced "a nation-wide program to revoke naturalization of all former leaders and officials of the German-American

Bund whose citizenship was obtained by false representations." The release condemned the Bund as un-American and pro-Nazi. It referred to certain of the defendants and cited evidence of the Bund's character which was used in this trial. Reference was made to the trial of Petitioner Klapprott in this case. The release was issued by the Department in Washington and government counsel at the trial had no connection with it (R. 488).

~~at the trial had no connection with it (R. 488).~~

At the inception of the trial the judge gave the usual cautionary instructions urging the jury not to discuss the case with any one or among themselves and to "be careful not to let any extraneous influences such as newspapers or anything like that affect your decision in the case." After counsel had made their opening statements to the jury, at the suggestion of Mr. Kiendl, the court again cautioned the jury in respect of newspaper stories as follows (R. 21):

> * * * ladies and gentlemen of the jury * * * newspapers are not going to try this case. We are. You the jury, and I, as the Judge of this court. I think it better, as Mr. Kiendl suggests, that you not read newspaper stories of this case at all. The stories are written from day to day and they may be colored by the thought and feelings of the writer. In any event, the day to day accounts do not comprise a

full account of the whole trial and are quite apt to mislead you, and it would certainly be better for you if you ignored the newspaper accounts of this trial altogether. But if your natural curiosity is too strong for you, I do admonish you with all the emphasis I possess not to let anything you read in the newspapers or anywhere else influence your trial and decision of this case in any way. You will have ample opportunity to hear the witnesses. Your picture of the case will be better than any you can get from any newspaper, because you have got a box seat at this trial and you will hear the evidence directly from the witnesses, and it is on the basis of the actual evidence you hear in this court and the law as I shall give it to you at the proper time, that you must decide this case. Is that fairly satisfactory?

Mr. KIENEL. More than satisfactory, your Honor.

On the day following issuance of the Department of Justice press release Mr. Fennelly, one of the defense attorneys, called the attention of the court to the appearance the day before of articles in New York newspapers based on the release. The trial judge denied his motion to withdraw a juror and declare a mistrial but inquired of Mr. Fennelly whether he desired a further direction to the jury to pay no attention to such articles, pointing out, however, that "to call attention to

the articles and admonish the jury to pay no attention to them, would create an incentive to any juror who had not seen the articles to go and look at them, to discover what it was the Judge was talking about" (R. 488)." The judge then, with the concurrence of defense counsel (R. 488), reiterated his general direction at the outset of the trial (R. 499). When the question of newspaper stories was again raised at the close of the Government's case, it was suggested by defense counsel that the court examine the jurors singly *in camera* to ascertain "whether or not they had read any article which in any way prejudiced them" R. 844). The court did interrogate the jury *in camera* and was assured that "they have read nothing or heard nothing which has in any way influenced them or prejudiced them in the trial of this case" (R. 845). Petitioners apparently ac-

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" There is no affirmative evidence that the jurors ever saw, read or were influenced by the articles. On October 9, 1942, however, one of the defense counsel incorporated the information in a question asked of a Government witness (R. 760). Although the witness was not a Bund member (R. 755) and was an alien (R. 757), Mr. Finn inquired (R. 760):

"And did anybody call to your attention recently any news that the Attorney General of the United States is planning to deprive people who were active in the Bund of their citizenship and to intern them for the duration of the war? Has that come to your attention before you testified here today?"

A. "No."

The Government objected to the question and the court stated that the objection was sound; but the witness had already answered.

cepted this assurance, since no further objections or motions were interposed.

While it was unfortunate that the Department's press release was issued during the course of petitioner's trial, that factor of itself did not entitle petitioners to a new trial unless the jury was prejudicially influenced by the release. *United States* v. *Montgomery*, 42 F. (2d) 254, 255 (S. D. N. Y.). This was a matter for determination by the trial judge. As we have shown, the trial judge determined to his satisfaction that the jury had not read or heard anything that had influenced them or prejudiced them against the petitioners. In these circumstances there plainly was no occasion for declaring a mistrial, since it was demonstrated that no harm had been done. *United States* v. *Reid*, 12 How. 360, 366; *Itow* v. *United States*, 223 Fed. 25, 28 (C. C. A. 9); *McHenry* v. *United States*, 276 Fed. 761, 764 (App. D. C.); *Stunz* v. *United States*, 27 F. (2d) 575 (C. C. A. 8); *Klose* v. *United States*, 49 F. (2d) 177, 182 (C. C. A. 8); *Shushan* v. *United States*, 117 F. (2d) 110, 116 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Welch* v. *United States*, 135 F. (2d) 465 (App. D. C.), certiorari denied, 319 U. S. 769; *Beard* v. *United States*, 82 F. (2d) 837, 844 (App. D. C.); cf. *Holt* v. *United States*, 218 U. S. 245, 250–251.[45]

[45] All the cases upon which petitioners rely are distinguishable from this case in the important fact that in none of them was there an affirmative showing, as there is here, that the

C. THE EXHIBITS SHOWING PETITIONERS' RELATIONSHIP WITH THE BUND AND THE BUND'S CONNECTION WITH NAZI GERMANY WERE PROPERLY RECEIVED IN EVIDENCE

There is no warrant for petitioners' assertion that the trial of the case "was characterized by the admission of numerous prejudicial and inflammatory exhibits having no tendency to prove the crime charged." It is true that among the Government's exhibits there were pictures of Hitler and other Nazi leaders, and party programs, pamphlets, uniforms, and flags; but they were properly received, we submit, as evidence showing the character of the Bund, the connection of the various petitioners with it, and petitioners' sympathies and their motives in carrying out the conspiracy charged in the indictments. Cf. *Spies* v. *People*, 122 Ill. 1, 11–79, 228–235, 236–237 (1887); *Haywood* v. *United States*, 268 Fed. 795 (C. C. A. 7), certiorari denied, 256 U. S. 689.

The Government maintained that the conspiracy charged was formed and effectuated by means of the German-American Bund organization. The nature and character of the Bund were therefore relevant and material. It was also material to establish the connection and affiliation of each of the petitioners with the Bund, and documents and physical evidence found in the possession of each of the petitioners showing that con-

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jury had not been influenced or prejudiced by the newspaper stories.

nection were relevant evidence. It was also part of the Government's case that the petitioners attempted to interfere with the successful operation of the Selective Service Act because of pro-German sympathy and because American military preparation was inimical to Hitler's plans. The petitioners' motive and purpose in carrying on admitted activities were the only seriously contested issue at the trial. Evidence, physical or other, showing sympathy with the German cause or attachment to it, was material.

At the inception of the trial, when the admissibility of a newspaper which was received by a witness from Bund headquarters was first questioned on the ground of immateriality, the trial judge after overruling the objection excused the jury and stated to counsel (R. 52–53):

> The COURT. Gentlemen, and counsel for the defendants particularly, that ruling at that point and another which I made during the morning I haven't explained the reason for and I think I would prefer that counsel understand what my basis is. The objection which you made to some question relating to the daily receipt of some German newspaper: I take it that your objection is based on the fact that that question tended to show pro-German connections and would be likely to prejudice the jury, is that about right?
>
> Mr. FENNELLY. Yes, your Honor, and has no materiality or relevance to the issue.

The COURT. Well, that is where we differ. I think it is entirely true that it is quite possible that evidence which may be introduced here showing pro-German sympathies, pro-Hitler activities, if there be such evidence, of this organization and these defendants may be calculated to some extent to prejudice the jury on the trial of this case, but I am of the opinion that such evidence has a definite materiality on the issue which we are here trying, that is, whether or not these defendants were involved in a conspiracy to counsel others to evade the requirements of the Selective Service Act. I think what their German connections and relations and affiliations were have a definite bearing and are definitely material and pertinent on a trial of the issue. I regret to say that it is possible, certainly possible that it may tend to prejudice the jury. The only thing I can do about it with my conception of the law is to charge the jury as strongly as I can which I propose to do at the proper time that they try this case free of such prejudice, that these defendants are not on trial for pro-German sympathies or pro-German activities other than this specific charge which we are here trying, this conspiracy, but the basis of my holding on that last objection, and the basis of other objections, if you care to make them, is going to be that I think that activities of the kind I have described are pertinent and

material to the issue that we [are] here trying. * * *

Contrary to petitioners' assertion, the various exhibits were not introduced in an orgy of flag waving deliberately planned by the Government to inflame the jury. Nor were the exhibits treated ostentatiously or "brandished before the jury" as alleged by the petitioners (Br. 54). Government counsel at the trial advise that prior to the introduction of each exhibit, it was in a carton out of view. As they became relevant, the exhibits were withdrawn from the cartons, identified, marked in evidence, and displayed (in some instances) to the jury. The exhibits were then replaced in the container and not withdrawn again except in one or two instances. They were not used or displayed during the summation of the Government's case nor were they given to the jury at the time it retired to deliberate.

Certain of the exhibits were introduced in evidence early in the trial, as the witness Luedtke testified concerning the nature and purpose of the German American Bund. (E. g. R. 26, 27, 34, 35, 37, 49, 57, 58, 60, 61, 62, 63, 66, 68, 69, 73, 90, 91, 92, 93, 94, 99, 115.) As the testimony at the trial related to a particular defendant, other exhibits, which had been procured from that defendant or which concerned him, were introduced. Thus, for example, with respect to petitioner Wendlandt, after certain of the Govern-

ment's evidence against him had been received, Federal Bureau of Investigation Agent Young took the stand and testified that he interviewed Wendlandt early in April 1942 (R. 657, 662, 699), and that Wendlandt at that time admitted that he had been unit leader of the Buffalo unit; that at the conclusion of the interview Wendlandt accompanied Young and other Federal Bureau of Investigation agents to the home of a Marie Krauss; that after she had consented to a search of her home, the agents found in her attic a bag which Wendlandt admitted he gave to Miss Krauss to hide there; that thereafter, on May 6, Wendlandt voluntarily appeared at the Federal Bureau of Investigation office and at that time identified each item in the bag as his; and that at his request pictures of Hitler, Rudolph Hess, Jan Hess, and Von Nasse and personal correspondence were returned to him. At this stage of Young's testimony the Government had the contents of the bag marked for identification. Defense counsel's objection to the exhibits on the ground that they would inflame the jury (R. 673) was overruled for the reason stated by the trial judge at the beginning of the trial (R. 673; see *supra*, pp. 83–85) and they were received in evidence. The exhibits taken from the bag are described at R. 673–674, 675, 676 and included such items as a photograph of the delegates to the 1940 Bund convention, an arm-band bearing a swastika, an application

in German for membership in the Bund, order blanks for the Bund newspaper, an order signed by Kunze as leader concerning the youth movement, a letter from petitioner Elmer to Wendlandt, the order appointing Wendlandt as leader of the Buffalo unit, a postcard picture of Hitler with an inscription in German on the back, a youth group flag used by the Buffalo unit, a swastika in a circle of white on a field of red, and other exhibits of a similar character.

With respect to the other petitioners, the exhibits ran along the same lines. In charging the jury in this connection, the trial judge made it clear that the evidence to which petitioners now object was to be considered only for its bearing on the "knowledge, intent or purpose of these defendants." The court charged the jury (R. 1018–1019):

> Let me point out to you clearly and distinctly that the German-American Bund, as an organization, is not here on trial, nor are any of these defendants on trial for being members or officers of the German-American Bund, or for any of the activities of the Bund, except as charged in the indictment. Much testimony and various documents and paraphernalia pertaining to the Bund and its activities have been admitted in evidence, but you should carefully bear in mind that such evidence is to be considered by you only so far as it has,

> in your judgment, a bearing upon the conspiracy charged in the indictment. Even though you should believe that the objects of the Bund were pro-German, pro-Hitler, pro-Nazi, and anti-Semitic, such a belief alone would not justify their conviction in this case, but you may consider the activities and policies of the Bund as disclosed by the evidence, and the activities and policies of these defendants, as disclosed by the evidence, insofar as in your opinion they have a bearing upon the knowledge, intent or purpose of these defendants in regard to their actions which the Government charges constitute a conspiracy.

Petitioners allude to the admission, in *Cramer* v. *United States*, 137 F. (2d) 888 (C. C. A. 2), certiorari granted, 320 U. S. 730, of what they state was evidence of a similar character. In the *Cramer* case this evidence was devoted to proving the enemy character and hostile mission of the persons Cramer was charged with having aided and comforted—a fact which Cramer's counsel had formally admitted, but which the Government was under obligation to prove. Here the challenged evidence related to the motives of petitioners and to the purpose of the conspiracy, and was germane to facts not otherwise established. We submit that the quantity of such evidence in the present case did not, especially in view of the number of defendants involved, exceed the bounds allowable

in the exercise of the trial court's discretion in the matter.

In evaluating petitioners' contention that the minds of the jurors were inflamed by the exhibits, it is significant to note that in reaching their decision the jurors did not proceed hastily and undiscriminatingly, as would be anticipated from a prejudiced jury. Rather, the jury deliberated over five hours (R. 1026–1027) before it returned its verdict, which exonerated one of the accused persons, Ferdinand Callsen (R. 1027).

IV

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY

We respectfully submit that the evidence against the petitioners which is summarized above (pp. 6–36) is substantial and clearly sufficient to support the verdict of the jury, both with respect to the existence of the conspiracy alleged in the indictment and with regard to the participation of the several petitioners in that conspiracy. In this case, in addition, the verdict has the explicit approval of both the trial judge (R. 1028) and the court below (R. 1077). See *United States* v. *Johnson*, 319 U. S. 503, 518. No more is required, of course, than that the evidence, taking the view of it most favorable to the Government, supports the verdict. It is equally well settled that "participation in a criminal conspiracy need not be

proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances' ". *Glasser* v. *United States*, 315 U. S. 60, 80.

During the course of the trial the Government used sixty-eight witnesses and introduced approximately 300 exhibits most of which were documentary in character. The evidence fell into two main categories. The first showed the nature and character of the Bund, the connection of the various petitioners with it, and the opposition of the Bund and its members to the Selective Service program for the primary reason that they feared that the men trained under the program would ultimately be used against Germany. The second category of evidence had to do with the acts of the individual petitioners in connection with the formation and effectuation of the conspiracy charged. The sufficiency of the evidence will appear, we believe, from a brief review of it.

William Luedtke, former National Secretary of the Bund, testified at length concerning the Bund leadership's oft expressed determination to do everything within its power to prevent the passage of the Selective Service Act. This witness was present at the Bund convention in September, 1940, when Kunze spoke "off the record" concerning the legislation (*supra*, p. 21). Luedtke also identified articles which appeared in the

Bund's weekly newspaper, also attacking the legislation even before the provision pertaining to Bund members was introduced (*supra*, pp. 19–20, 23, 27–28). He testified concerning the Bund Executive Committee meeting at which Command No. 37 was formulated and unanimously agreed upon by Petitioners Kunze, Klapprott, Elmer and Keegan, and at which Kunze stated that the Bund must fight certain legislation, particularly the Selective Service bill (*supra*, pp. 23–25). Luedtke also told of the preparation and distribution of Bund Command No. 37 (*supra*, p. 25) and a meeting of some fifty Bund leaders and members at New York City, which was held shortly afterward and at which the Selective Service Act and the Bund's opposition to it were discussed (*supra*, pp. 26–27).

In addition to Luedtke, the Government produced thirty-six former members of the Bund and sympathizers with it, some of them hostile to the Government, who testified concerning the reading and dissemination of Bund Command No. 37 by those petitioners who were Unit leaders, the discussions which followed in meetings, and the visits of Petitioners Kunze, Klapprott and Keegan to the local Units in the months that followed (*supra*, pp. 28–33). Signed statements, executed by fourteen petitioners, were also introduced. These set forth the petitioners' contentions with the Bund and their participation in the dissemination of

Bund Command No. 37. In two instances oral admissions (those of Bachmaier and Wendlandt) were introduced, in addition to written statements.

The evidence was direct, interrelated and generally corroborated. The case was documented to a great extent and the evidence was uncontradicted since the petitioners offered no evidence in their own behalf. The sufficiency of the evidence has been sustained by both courts below, and there is, we submit, no basis upon which it can validly be regarded as insufficient to sustain the jury's verdict.

In an organization conducted according to the "leadership principle", as was the German-American Bund, the conspiracy necessarily centered at national headquarters and, more particularly, in Bundesfuehrer Kunze. The evidence as summarized above shows that the entire course of the Bund's National Executive Committee, headed by Kunze, with reference to the Selective Service legislation, was one of strong opposition. The purpose was, first, to prevent the enactment of the Selective Service Act if possible and, second, after the Act had been passed, to impede its operation by stimulating refusal to serve on the part of persons of German extraction who might be drafted. The conspirators were clearly guilty of knowingly counselling "diverse persons to evade, resist and refuse service in the land and

naval forces of the United States", as charged in the indictment (R. 2).

The conclusion is inescapable that the Bund and its leaders were dedicated primarily, if not entirely, to serving the interests of the Third Reich and to strengthening and maintaining the self-conscious, militant organization of persons of German blood everywhere as a means of extending National Socialist principles. To stimulate the willingness of "German-Americans" to join their movement and to hinder the recruitment of armed forces which they feared might be used against Germany, the conspirators harped upon the theme that persons of German extraction in the United States were being subjected to discrimination and degradation at the hands of their Government. The inclusion of Section 8 (i) in the Selective Service Act, even though that provision extended only to members of the Bund and of the Communist Party, was seized upon as evidence of discrimination against all German-Americans and as a justifiable basis for urging refusal of military service on the part of persons of German extraction. In respect to the alleged purpose of testing the constitutionality of Section 8 (i), it is significant that no test case was ever brought.

The petitioners who were not national officers of the Bund participated in varying degrees in furthering the conspiracy; but they aided in carry-

ing out the policies just stated. They were prominent members, at least locally, of an organization, the nature of which they must have understood; some of them attended national conventions and took part in or listened to the discussions there; they willingly transmitted the contents of Bund Command No. 37 to the members of their units; and several undertook to give oral advice concerning the meaning of the Command.

The conspiracy charged in the indictment having been established by the Government's proof, it was not necessary to establish participation by each defendant in all aspects of the conspiracy; it was sufficient to connect each individual with the conspiracy by definite evidence. Each petitioner, if shown to have been consciously involved, was chargeable with the conspiracy as a whole, and the acts of his co-conspirators in furtherance of the common plan were evidence against him. *United States* v. *Manton*, 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Allen* v. *United States*, 4 F. (2d) 688, 692 (C. C. A. 7), certiorari denied, 267 U. S. 597, 598, and 268 U. S. 689; *Rudner* v. *United States*, 281 Fed. 516, 519–520 (C. C. A. 6), certiorari denied, 260 U. S. 734. Under this well-understood theory of the nature of conspiracy, we submit that there is sufficient evidence to sustain the verdict of guilty as to each of the petitioners.

In order to make clear the relationship of each petitioner to the conspiracy and to assist the Court in judging the sufficiency of the evidence involving him, the evidence with regard to each of the petitioners is summarized in the following paragraphs.

Gerhard Wilhelm Kunze.—Kunze clearly played the leading role in the conspiracy in this case. No useful purpose would be served by repeating all of the evidence which directly implicates him. Briefly, it shows that during the significant period of time he was the supreme national leader of the Bund (*supra*, p. 6) and the editor and manager of the "Free American and Deutscher Weckruf und Beobachter" (*supra*, p. 17); that after consultation with and advice from the Bund's National Executive Committee, Kunze issued mandatory orders to the officials and members of the Bund (*supra*, pp. 14–15); that Kunze was at all times the leading exponent of the Bund's pro-German policies; that upon the introduction in Congress of the bills which later became the Selective Service Act, Kunze, together with the other officials of the Bund, adopted and pursued a policy of unqualified opposition to this legislation (*supra*, pp. 19–35); that Kunze not only counselled opposition to the bills which became the Selective Service Act, but exhorted all to support the Bund's policies even to the extent of assuming

the risk of "going to prison, if necessary" (*supra*, pp. 18–22); and that at the meeting of the Bund's national officers in Kunze's office, attended by Kunze, Keegan, Klapprott, Elmer, and Luedtke, Kunze stated in part that the Bund "must take it upon itself to fight this legislation * * * this Selective Service law * * *." (*supra*, pp. 23–25). On October 1, 1940, Kunze issued over his signature Bund Command No. 37 (*supra*, pp. 25–26). Shortly thereafter at a meeting of national officers, unit leaders, and others in New York, Kunze and others explained the Bund's stand against the performance of military service by persons of German ancestry (*supra*, pp. 26–27). After the reading of Command No. 37 by unit leaders at meetings of units of the Bund (*supra*, pp. 36–37), Kunze visited various units and further directly and inferentially urged upon the Bund members resistance to and refusal of military service (*supra*, pp. 30–33), counselling as a possible means of evasion of such service the use of the claim by individuals that they were conscientious objectors (*supra*, p. 32).

August Klapprott.—Petitioner Klapprott was the Gauleiter of the Eastern "Gau" (R. 28–29, 44–45, 201) and a national officer of the Bund (R. 191, 202, 203, 209–212). On August 15, 1940, the Bund's newspaper carried an article by Klapprott attacking the conscription program (*supra*, p. 20). He was a delegate to the 1940 convention

(R. 89, 90). He was present at the meeting of the national officers (*supra*, p. 21) at which the question of the Bund's "fighting the Selective Service Act" was discussed (R. 83–88). Klapprott presided at the unit leaders' meeting held in New York at about the time of the issuance of Command No. 37, at which the position that Bund members "should not have to do military service" was assumed and other similar statements were made by Kunze and agreed to by all present (see supra, p. 26). In October or November 1940, Klapprott addressed a meeting of about fifteen members (R. 608) of the Newark unit, stating, in part, that "if the German American citizen is not treated as such" he would "not have to bear arms for this country" (R. 606, 606–609). He also stated that he "was going to try to get somebody for a test case" (R. 607). In November 1940, Klapprott discussed Command No. 37 with petitioner Rapp and several others (R. 748–749). During this discussion it was stated by these individuals that they "had to register for military service, but they did not think it was right to ask them * * * to fight against Germany" (R. 749). Between December 1, 1940, and March 14, 1941, Klapprott accompanied petitioner Kunze on trips to the Bund's units in various cities (R. 137; Gov. Exs. 128, 129, 131), at which the Bund's policy as to Selective Service was discussed by both Kunze and Klapprott (*supra*, p. 30). On

one occasion Klapprott stated that he "would not fight against Germany" (*supra*, p. 19) and in other ways encouraged opposition to military service.

Wilbur V. Keegan.—In 1939 Keegan became a member of the Hudson County unit and subsequently general counsel for the Bund (R. 47, 48, 55, 104, 163, 165–166. He shared, from March 1940, an office and secretary with the Bundesfuehrer at the national headquarters (R. 43, 47, 52, 54, 82, 89) and attended and participated in meetings of the Executive Committee at which decisions on matters of Bund policy and action were made (R. 70–71, 191, 193). He apparently devoted his entire time to the Bund (see R. 159–160) and participated in Bund activities in other ways than by rendering legal advice. He discussed with Klapprott and wrote articles for the Bund paper (R. 48-49, Gov. Ex. 135, 137, 138), and was present at the Bund's national conventions in 1940 and 1941 (R. 89, 105; Gov. Ex. 7A, pp. 16, 20, 91) and at Bund centers on various occasions (Def. Ex. B). He was present at the meeting of the national officers of the Bund at which the fight upon the Selective Service Act was discussed (R. 83, 87, 109, 110, 220–222) and intervened occasionally in the discussion with "legal phraseology in the given matter" (R. 84). He was associated with the Bund at the time that Bund Command 37 was issued (*supra*, pp. 25–26)

and spoke concerning it at the meeting of the unit leaders in New York (*supra*, p. 26). At about the same time, on October 3, 1940, an article entitled "No Rights, No Duties," appeared in the Bund paper and an editorial accompanying it was attributed to Keegan (*supra*, p. 28).[46] Keegan spoke to Bund members concerning selective service, once stating that because of the discrimination against Bund members, in the words of the witness, "it was not justified for them to serve in the armed forces" (R. 521). He further stated that evasion of service could be accomplished by Bund members by claiming to be conscientious objectors (R. 781, 783). He was shown to have continued his activities in the Bund's

[46] The editorial was a warning to the German-American population "that they live under a political condition which is only prolonging their civil and political death;" that they were living under conditions like those of "our ancestors who dared to fight an earlier despot;" that "if need be we will again resist and die * * * to again restore the liberty lost, and the self-respect scoffed at, in preference to being easy-going, soft victims of such brute force of fire and violence, the same fire and violence that made our liberty disappear into a vacuum—the fire, and violence that now calls upon us to sacrifice another God-given right—life—to forge the chains that will bind us forever into serfdom;" that the President's aim was to exterminate the rights and lives of all German-Americans; and that "our only fear is the fear that we will be too late in making our fellow countrymen * * * join the parade that will resurrect the *chloroformed* body of our beloved America, and finally, to restore it to all its pristine glory that it enjoyed from 1776 to 1933." (Gov. Ex. 139, p. 1.)

behalf through 1941 and into 1942 (see *supra*, pp. 33–36).

Gustav Elmer.—Petitioner Elmer was the Bund's national treasurer and organizational manager (R. 45–46, 191, 201, 203, 212; Gov. Exs. 142, 142A). He prepared the copies of and handled the distribution of all Bund Commands (R. 83, 246–247, 739) and distributed Command No. 37 (R. 83). He was at the national officers' meeting between August 15 and October 1, 1940 (R. 83, 87, 220–222) and attended the 1940 convention (R. 90), passing upon the credentials of all delegates to it (R. 90, 92, 93–94, 101, 252). Between February 8–17, 1941, and July 4–9, 1941, Elmer accompanied petitioner Kunze on trips to various cities (R. 137, 138; Gov. Ex. 130, 134) at which the Bund's policy as to Selective Service was discussed.

Otto Fentzke.—Petitioner Fentzke was a unit leader or assistant unit leader of the New York unit (R. 90, 748; Gov. Exs. 88, 355). He was present at the Bund's 1940 convention (R. 105), for which he had issued credentials to certain of the delegates (R. 90), and at the meeting of unit leaders held at about the time Command No. 37 was issued (R. 409). Upon being questioned on May 15, 1942, in the United States Attorney's office (R. 737), Fentzke stated that he was the assistant unit leader of the New York City unit and that he received and read to the unit members.

as was his duty, Bund Commands Nos. 27 to 41, inclusive, including Bund Command No. 37 (R. 740–741; Gov. Ex. 355). Fentzke could not recall, however, whether there was any discussion of Command No. 37 by the unit members (R. 741; Gov. Ex. 355). Fentzke, with Ehmer, handled the distribution of all Bund Commands (R. 739, 741). Fentzke also handled the distribution of the Bund's newspaper (R. 44, 739–741).

William C. Kunz.—Petitioner Kunz was unit leader of the unit in the Bronx, New York City (R. 731; Gov. Ex. 354, R. 730). Kunz read Command No. 37 to the members of his unit (R. 731, 732; Gov. Ex. 354). He attended the unit leaders' meeting in New York (*supra*, p. 26; Gov. Ex. 354) at which "Kunze explained the Bund's stand."

Max Rapp.—Petitioner Rapp, treasurer of the Bund's "O. D." division (R. 25), was an acting unit leader of the New York unit (R. 46, 87, 743, 744) and was present daily at the Bund's national office in New York (R. 46). Rapp discussed Command No. 37 with the members of his unit, in part stating that although the members of the unit had to register, "* * * you should not ask us to fight against German people, * * *" (*supra*, p. 29). In about November 1940, Rapp, Klapprott and others, discussing military service, stated that they "didn't think it was right to ask them * * * to fight against Germany" (*supra*, p. 31).

Bruno Knupfer.—Petitioner Knupfer was the leader of the Bund's unit at Brooklyn, New York (R. 322, 331; Gov. Ex. 142A, 151, R. 363). He attended the 1940 convention of the Bund (Gov. Ex. 124, 125) and designated delegates to that convention (Gov. Ex. 109, 110, 111, 113). He was present at the meeting of the national officers and unit leaders held in New York (*supra*, p. 26). Knupfer admitted in a written statement (Gov. Ex. 151) and a member of his unit testified (R. 324, 326) that Knupfer read Command No. 37 at a meeting of the Brooklyn unit attended by about 25 or 30 persons (R. 327). In the discussion which followed, Knupfer explained to those present "that a lot of German people lose their jobs, and in a case like that we should refuse to fight," that "* * * no German should fight for this country" (*supra*, p. 29). When a Bund member persistently questioned Knupfer as to what would happen to him if he refuses to register or go into the army, Knupfer assured him that "nothing will happen to you * * *" and that an attorney in the Bund organization would take care of things like that (*supra*, p. 29).

Walter Borchers.—Petitioner Borchers, unit leader at Jamaica, New York (R. 131, 367, 373; Gov. Ex. 183, R. 381), was at the Bund's 1940 convention (R. 105). He attended the unit leaders' meeting in New York (*supra*, p. 26; R. 391) and

asked whether that part of Command No. 37 which counsels refusal of military service was legal (R. 391). Borchers read Command No. 37 at a meeting of the Jamaica unit (R. 366–367). He was present at the discussion which followed the concert of the New York Volkschor on December 13, 1941 (*supra*, p. 34).

Hugo Weiss.—Petitioner Weiss was the Bund's unit leader for Astoria, New York (R. 91; Gov. Ex. 204, R. 469). Weiss was present at the Bund's 1940 convention (R. 105) and issued credentials to other delegates (R. 91). He admitted in a signed statement that he read Command No. 37 to the members of his unit of the Bund (Gov. Ex. 204). He also disclosed in this statement that members of the Bund "were obliged to follow the instructions of the Bund Commands * * *" (*ibid.*). Weiss was present at meetings in New York at which the Selective Service Act was explained (Gov. Ex. 204).

Otto Bregler.—Petitioner Bregler was unit leader at Lindenhurst, New York (R. 92, 581–582). He appointed delegates to the 1940 convention (R. 92). A member of the Lindenhurst unit testified that the unit leader usually read the Bund commands to the members of the unit (R. 582) and that Bregler read Command No. 37 at a meeting of the unit (R. 582, 583) attended by the witness and a female member of the unit

(R. 585). Bregler probably was in the group which met following the Volkschor concert in December 1941 (*supra*, p. 34).

John C. Fitting.—Petitioner Fitting was leader of the Hudson County, New Jersey, unit (R. 165, 435; Gov. Ex. 202, R. 448). He was present at the Bund's 1940 convention (R. 105). Fitting, who regarded the Bund Commands as mandatory upon the members (*supra*, p. 16, fn. 14, read Command No. 37 to his unit Gov. Ex. 202, R. 448), adding that "because of * * * discriminations, against the members of the organization, the organization felt that the members should not be called into the Army until discrimination stopped" (R. 436, 440).

Ernest Martin Christoph.—Petitioner Christoph was unit leader at Newark, New Jersey (R. 605; Gov. Ex. 298, R. 611) and attended the Bund's 1940 convention (R. 105) and the meeting of unit leaders in New York City (*supra*, p. 26). Christoph, who conceived it to be within his power "to dismiss" any individual who disobeyed the commands (Gov. Ex. 298), read Command No. 37 to the members of his unit (Gov. Ex. 298). In October or November 1940, at a meeting of the Newark unit, petitioner Klapprott, seated at a table at the head of the meeting room with Christoph and two others, stated at the end of the meeting in a discussion of the Selective Service Act in Germany, that "if the German-

American citizen is not treated as such he would not have to bear arms for this country" (R. 606).

Karl Richard Wendlandt.—Petitioner Wendlandt was the acting unit leader at Buffalo, New York (R. 141, 640, 716; Gov. Exs. 309, 330) and was present at the Bund's 1940 convention (R. 105; Gov. Exs. 309, 33[illegible]). He read Command No. 37 to the members of his unit (R. 641, 717, 722) and then stated, in part, that it was "a damned shame that German blood has to be spilled against our German brothers over in the old country * * * until the United States is ready with the armed forces the war will be over with Germany winning" (R. 716–717). Wendlandt regarded himself "as being at liberty to ask for * * * resignations" of members of his unit who did not approve of the Bund's activities (Gov. Ex. 330). Upon one of Kunze's visits to Buffalo (R. 642) in the fall of 1941 (R. 643), at a meeting of the unit (R. 643, 644), Kunze and Wendlandt "made a laughing stock" of a member who suggested that the Bund dissolve in the event of war to "show the Government of the United States that it is a patriotic organization and want to fight for the country * * *" (R. 644).

Louis Schatz.—Petitioner Schatz was the unit leader at Troy, New York (R. 490, 501; Gov. Ex. 242). Schatz read Command No. 37 (R. 490, 494; Gov. Ex. 242) to the members of the Troy unit, meeting at his home (R. 490, 492).

Herman Agne.—Petitioner Agne was Unit Leader of the Philadelphia Unit of the Bund (R. 614, 618) and usually attended the Unit's meetings in that capacity (R. 628). Two members of the Philadelphia Unit testified that Bund Command 37 was read and discussed at a meeting of their Unit, in the fall of 1940, and that it was their impression that Agne was the one who stated the substance of that command and participated in the discussion (R. 614–615, 622, 623, 624). The discussion was to the effect that the members should not fight for this country until their "rights" had been restored to them (R. 622, 623). At a subsequent meeting, in 1940, at which petitioner Kunze as well as 25 or 30 members of the Philadelphia Unit were present (R. 619, 625), Agne introduced Kunze to the members and Kunze spoke concerning his trip through the States (R. 619; see *supra*, pp. 30–33) in furtherance of Command No. 37 (R. 619, 625). At this meeting, in his discussion of the Selective Service Act, Kunze told his audience that it was unfair to expect German Americans to fight when they were denied the right to work (R. 619, 625, 626). When Kunze concluded his address, Agne thanked him for coming to the meeting and told the members that "he hoped Mr. Kunze had made an impression on us" (R. 620).

Joseph Bachmaier.—Petitioner Bachmaier was unit leader of the Erie, Pennsylvania, unit, which

was not organized until some time in December 1940 (R. 141, 251-252; Gov. Ex. 299, R. 631). Bachmaier met Kunze, who was accompanied by Klapprott, at the home of petitioner Schneller, Jr., (see below), where Kunze persuaded Bachmaier and others present to organize a unit of the Bund in Erie. Thereafter Bachmaier, Schneller, Jr., and others organized the Erie unit, and meetings of that unit were held at times at the homes of Bachmaier and Schneller and in taverns (Gov. Ex. 299). Bachmaier admitted in his written statement that he read Command No. 37 "to the group" (Gov. Ex. 299). According to the testimony of F. B. I. Agent Stephenson (R. 632), also, about a month after he had obtained from Bachmaier his written statement, Bachmaier, at another interview, told Stephenson that he had received certain back issues of the Bund Commands among which was Command No. 37, and that he had read this command to his group.

Walter Schneller, Jr.—Petitioner Schneller was a leader of the Erie, Pennsylvania, unit of the Bund after its organization in December 1940 (R. 141; Gov. Ex. 133), but the precise dates during which he held office are not shown by the evidence. Luedtke, the national secretary of the Bund, testified that Kunze and Klapprott visited the Erie unit in early December 1940 (R. 137) and that he (Luedtke) visited the Erie unit with

Kunze on two occasions, on one of which they stayed at Schneller's home. (R. 138–139.)

Witness Schnurpfeil, editor of the Erie Deutsche Zeitung (R. 637), testified that Schneller as a columnist for that paper wrote the column bearing his name on page 5 of the October 18, 1940, issue (R. 637–638). This article (Gov. Ex. 300)[17] attacked the Selective Service Act as a "Confiscation Bill" and warned prospective inductees that they would find themselves in disastrous financial circumstances as a result of being subjected to compulsory military service.

Fritz Streuer.—Petitioner Streuer was the Bund's unit leader at Detroit, Michigan (R. 141) and was present at the 1940 convention (R. 105). According to two witnesses, Streuer read Command No. 37 to the members of his unit (R. 753,

[17] In admitting Government Exhibit 300 in evidence the court charged the jury "that this article is dated October 18, 1940, at a time when it has been alleged a conspiracy existed. If you after you hear all the evidence are satisfied beyond a reasonable doubt that the defendant Schneller at that time was a member of any conspiracy as alleged then you may consider the articles as evidence against all parties. Unless you do from all the evidence when you have heard it believe that Schneller was a member of the conspiracy as alleged, then I will direct you not to regard it as against anyone" (R. 638–639).

Since the jury's consideration of Government Exhibit 300 was conditioned on its finding that Schneller was a member of the conspiracy on October 18, 1940, it is plain that the evidence was admitted on the theory that if the condition were met, it was evidence of the conspiracy.

756–757, 758)." Upon a subsequent occasion, apparently in speaking of military service, Streuer "mentioned" that "if anybody has chances to stay away from it, which naturally sometimes happens to some people, it is all right for them * * *" (R. 761).

Josef Belohlavek.—Petitioner Belohlavek was unit leader at Cleveland, Ohio (R. 93, 141, 555, 563; Gov. Ex. 265, R. 568). He attended the Bund's 1940 convention (R. 105, 252) and appointed other delegates to it (R. 93). Two members of Belohlavek's unit testified that it was Belohlavek's custom to place the Bund Commands upon his desk at his home at meetings of the unit and to call attention to them so that they might be taken by those who desired to read them (R. 556–558, 563, 565), and that Command No. 37 was handled in this manner (R. 557, 564). In his written statement Belohlavek admitted that he "always passed the Bund orders around to the

[15] Petitioner's characterization of the testimony of these witnesses as being "of the most hazy, indefinite character, a situation not wholly unrelated to their fondness for drink (R. 754–755; 759–760) in which one at least was encouraged by an Assistant United States Attorney" (R. 759; Br., p. 95) finds no support in the record. Both witnesses admitted that they drank some beer on the day Command No. 37 was read (R. 755, 760; see also e. g., R. 368, 536, 615, 740), but there is no evidence whatsoever that either witness was under the influence of liquor or beer on the day he testified.

members to read at the meeting" (Gov. Ex. 265)."

Otto Willumeit.—Petitioner Willumeit was the unit leader of the Bund's unit in Chicago, Illinois (R. 93, 141, 518, 528). He attended the Bund's 1940 conventon (R. 105) and appointed delegates to it (R. 93). Several members of the Chicago unit testified that Willumeit read Command No. 37 at a meeting of that unit (R. 508, 514, 528–529, 531–533) attended by at least 60 people (R. 526, 537). Petitioner Kunze, who was present either at this or at a subsequent meeting at which Command No. 37 was discussed (R. 528–530), stated, in the presence of Willumeit, that if "* * * we are not good enough to work as American citizens then we are not good enough for military service either" (R. 530, 520; also 526).

Carl Frederick Berg.—Petitioner Berg was unit leader at Minneapolis, Minnesota (R. 92, 392, 417; Gov. Ex. 187A, R. 428). Berg appointed delegates to the 1940 convention (R. 92), but did not himself attend (Gov. Ex. 187A). At a meeting of the Bund members of Minneapolis and St. Paul at his home in October 1940 (R. 410, 418, 419), Berg read Command No. 37 (R. 409, 419; see also R. 396, 406; Gov. Ex. 187A). Command No. 37 was again read subsequently, in October or No-

[49] Shortly after the Selective Service Act became effective, Belohlavek, in a conversation in his office with a mail carrier in effect stated that if he, Belohlavek, were drafted and sent abroad, he would "run to Germany and fight against the United States" (R. 711).

vember 1940 (R. 410), to this unit in Berg's presence by petitioner Kunze (R. 419). Kunze said that "those that could afford it should refuse military service because the German-American was discriminated against, and the Bund would make a test case of it" (R. 411, 397).

Hermann Schwinn.—Petitioner Schwinn was Gauleiter of the West Gau (R. 29, 53; Gov. Ex. 87, Command 33A; Gov. Ex. 197, p. 11) and unit leader at Los Angeles, California (R. 141, 247, 286–287, 294, 300, 304). Four members of Schwinn's unit testified that Schwinn read Command No. 37 to the members of his unit (R. 288, 294, 300, 304, 309). In a discussion concerning this Command, in which Schwinn participated to some extent, it was stated, among other things, that "it would require a constitutional amendment * * * to legalize the draft during time of peace * * *" (R. 304).

Schwinn's Bund dues book shows that he paid dues for the year 1940 up to and including the month of October, 1940 (R. 259; Gov. Ex. 147; see also R. 283–284). On November 19, 1940, Bund Command No. 38, over the signature of Kunze, stated that "we are forced to accept his [Schwinn's] withdrawal as an officer and a member" of the Bund, without indicating the date of such action (R. 283, 260; Gov. Ex. 87, Command 38). In October 1940, Schwinn had refused to sign an undated resignation as requested by

Kunze (R. 249, 250). He had other differences with Kunze in matters of policy (Def. Ex. B). Witness Woeppelmann, who succeeded Schwinn as leader of the Los Angeles unit, testified that Schwinn ceased to be unit leader, and he, Woeppelmann, was appointed during the spring of 1941 (R. 287; see also R. 248–250, 294). Witness Young, a member of the Los Angeles unit who was also a Government informer, testified that Woepplemann was "the figurehead," and that in February 1941 "Kunze himself said that we had to have a man as head of the Western Unit for outside appearances, but for all internal work Schwinn maintained that position" (R. 304; see also R. 312). On about May 24 and 25, 1941, Kunze and Luedtke, upon their tour of units in furtherance of the policy of opposition to the Selective Service Act (*supra*, p. 30), visited the Los Angeles units and petitioners Schwinn (R. 140).

William Ottersbach.—Petitioner Ottersbach was the unit leader at Seattle, Washington (R. 141, 768; Gov. Ex. 356; R. 762–763). He read Command No. 37 to the members of his unit (R. 768–769; Gov. Ex. 356).[30] As stated above (pp. 31–32), at a subsequent date (R. 778) petitioner

[30] In a written statement, Ottersbach said: "As leader of the German American Bund, I instructed the members to follow the commands as given by the New York office of the German American Bund." (Gov. Ex. 356.)

Kunze addressed Ottersbach's unit advising about 30 or 40 persons who were present that German-Americans were discriminated against and should not fight for this country and should not fight against Germany.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
JAMES M. MCINERNEY,
ROBERT S. ERDAHL,
Special Assistants to the Attorney General.
RALPH F. FUCHS,
WILLIAM STRONG,
IRVING S. SHAPIRO,
PETER J. DONOGHUE,
Department of Justice.

NOVEMBER 1944.

APPENDIX A

The Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 50 U. S. C. App. Sec. 301 *et seq.*, provides in part:

> SEC. 8. * * * (i) It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund.
>
> * * * * * *
>
> SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provi-

sions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, *or conspire to do so,* shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *. [Italics added.]

The Act of June 18, 1934, c. 595, 48 Stat. 1008 5 U. S. C. 300a, provides in part:

The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to serve warrants and subpenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person

making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. * * *

Section 1 of the Act of August 18, 1894, c. 301, 28 Stat. 416, as amended, 18 U. S. C. 595, provides in part:

It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, * * *

APPENDIX B

AMERIKADEUTSCHER VOLKSBUND
GERMAN AMERICAN BUND
MILITARY ORGANIZATION OF FREE AMERICANS

Neuyork, d. 1. 10. 1940.

Bundesbefehl Nr. 37

1—*Bezeichnung und Abgrenzung der Hoheitsbereiche:* Die Festlegung der Nummerierung der Ortsgruppen usw., und die Abänderungen in der Zusammensetzung und Abgrenzung der Gaue, tritt mit sofortiger Wirkung in Kraft, wie im *Bundesorganisationsbefehl Nr. 3* erläutert.

Die Gliederungsabteilungen (OD, Jugendschaft, Frauenschaft), führen hinfort dieselbe Nummer wie die entsprechende Ortsgruppe usw.

2—*Bundesgruss:* Wo auf Englisch gegrüsst wird, bei englischen Versammlungen, Vorträgen und Schreiben, bleibt der Bundesgruss wie bisher "FREE AMERICA!"

Wo aber auf Deutsch gesprechen oder geschrieben wird, *lautet der Bundesgruss hinfort:* „HEIL!", einschliesslich beim Abschluss deutschsprachiger Versammlungen, Vorträge usw.

3—*Jugendschaftsbeiträge:* Die erwachsenen Jugendführer und-Amtswalter beider Geschlechter, die also Bundes-Vollmitglieder oder Förderer sind, entrichten ab 1. September 1940 monatlich 80¢ Bundesbeitrag an ihre Ortsgruppe bzw. Stützpunkt, anstatt wie bisher 55¢. An

ihrem Jugendbeitrag von 20¢ monatlich ändert sich nichts.

3a—*Ausländeranmeldung für Jugendliche:* Die Jugendschaft des AV ist keine eigentliche Organisation und betreibt auch nicht als eine von einer anderen Vereinigung getragene Gruppe irgendwelche politische Tätigkeit. Infolgedessen brauchen jugendliche Nichtbürger, die etwa mit der Jugendarbeit zu tun haben, die AV-Jugendschaft bei der Beantwortung der Frage Nr. 10 auf dem Ausländeranmeldebogen NICHT zu erwähnen.

4—*Wehrdienst:* Am 16. Oktober d. J., müssen sich alle Bürger und Nichtbürger (männlich), die mündig sind, ohne das 36. Lebensjahr vollendet zu haben, bei den Militärbehörden melden. Dieser Vorschrift ist anstandslos nachzukommen.

Wir stehen jedoch auf dem Standpunkt, dass eine *EINZIEHUNG* zum eigentlichen *MILITÄRDIENST NICHT* gerechtfertigt ist, insofern es sich um Bundesmitglieder und volkstumsbewusste Amerikadeutsche handelt, *da in dem Wehrpflichtgesetz die Bürgerrechte der Kämpfer dieses Deutschtums, also der Bundesmitglieder, verfassungswidrig beschnitten sind!*

JEDER, der es irgend auf sich nehmen kann, wird sich daher im gesetzten Fall *WEIGERN, Militärdienst zu leisten, bis dieses Gesetz und alle anderen Gesetze des Landes oder der Staaten usw., welche Bundesmitglieder in ihren Bürgerrechten einschränken, WIDERRUFEN SIND!*

Wir werden einen Präzedenzfall in dieser Knechtungssache durchfechten!

5—*Freibriefüberreichung; Einsetzung von Ortsgr.-Stützpunktleitern und deren Amtswaltern; Über-*

abe von Ehrennadeln: Im Laufe der Monate Ok-
ober und November, werden alle Ortsgruppen
nd Stützpunkte von je zwei Bundesamtswaltern
esucht. Wo angängig, wird der jeweils zustän-
ige Gauleiter einer dieser Besucher sein. Am
Abend des Besuches hat in jeder Ortsgruppe bzw.
tützpunkt ein Mitgliederappell stattzufinden,
hne Beteiligung von Aussenstehenden. Im Rah-
nen dieses Appells findet die Übergabe des Frei-
riefes, die Bestätigung und Einsetzung von Orts-
ruppen- bzw. Stützpunktleiter, Amtswaltern und
Mitarbeitern und die Übergabe von Ehrennadeln
tatt.

Die Bestallungsurkunden haben bis zu diesem
Abend fertig unterzeichnet zur Bestätigung vor-
uliegen; möglichst viele Entschuldungsspenden
ind zu diesem Appell zur Abrechnung bereit zu
aben.

Anschliessend an den Appell kann ein Kamerad-
chaftsabend oder dergl. unter Beteiligung von
fästen veranstaltet werden.

Angaben über den Verlauf der Reise im *Mit-
elwesten* und *Westen,* sowie über den Reisebei-
rag der einzelnen Ortsgr.-Stützpunkte, sind im
Sonderbefehl auf *Seite 4* des *Bundesorganisa-
ionsbefehls Nr. 3* enthalten. Die entsprechenden
Angaben für den *Gau Ost* werden getrennt be-
anntgegeben.

Heil!

WILHELM KUNZE,
Bundesführer.